Supreme Court, U.S.
FILED

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No. 94-1364 FEB 13 1995

OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1994

FEI, LTD., JOHN J. FOGARTY
and JEAN FOGARTY,

Petitioners,

-against-

OLYMPIA & YORK BATTERY PARK COMPANY, also known as WFC TOWER A COMPANY; O&Y (U.S.) DEVELOPMENT CORP., as successor to O&Y TOWER C CORP.; OLYMPIA & YORK TOWER B COMPANY; OLYMPIA & YORK TOWER D COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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98 FP

QUESTIONS PRESENTED

I.

Are there not questions of fundamental fairness raised concerning issuance of a brief Summary Order affirmance of dismissal of $5M of claims nine (9) months, subsequent to a December, 1993, oral argument upon a 1988 trial severance appeal in context of such issuance on the eve of a publicly reported proceeding relating to the liable party's possible bankruptcy and in context of an oral argument which evidenced apparent plan for reversal?

II.

Does not an announced "recusal" contained solely in such brief Summary Order, however, absent all stated grounds and date of occurrence, raise questions of fundamental fairness particularly concerning a party's rights to a fair, impartial and full appeal, including *en banc* reconsideration rights?

III.

Grounded upon a 1988 trial severance ruling that $5M of FEI claims were "***really out of the case***", was there not absent FRCP R. 49(a) authority for the 1992 dismissal of such claims?

IV.

Does not FRCP R. 42(b) require that there be a trial of claims which have been "severed" at an earlier trial?

V.

May there be approval given to a December, 1992, conference ruling dismissing $5M of 1988 trial-severed claims upon grounds that in answer to special interrogatories a jury must have determined such claims upon the theory of "What O&Y Agreed To Pay", notwithstanding that in a voluminous trial and post-trial record there does not appear any contention that the jury

so was requested to answer, nor that any party or the court argued or charged upon such theory, nor that such theory was contained in either of two (2) lengthy opinions nor therein remotely referenced, but rather, that such theory appears in justification of the dismissal solely at the December, 1992, conference?

VI.

Did not the 1988 jury verdict determine that FEI substantially had performed upon the contract with O&Y, *inter alia*, because the award to O&Y upon its claim was *de minimis*, i.e., a mere 2-4 % of O&Y's alleged damages?

PARTIES

The names of all of the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follow: Olympia & York Battery Park Company, also known as WFC Tower A Company; O&Y (U.S.) Development Corp., as successor to O&Y Tower C Corp.; Olympia & York Tower B Company; Olympia & York Tower D Company (collectively, "**O&Y**"); Insurance Company of North America, Philadelphia ("**INA**"); FEI, Ltd. ("**FEI**")[1], John J. Fogarty and Jean Fogarty.

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[1]FEI, Ltd. does not have a parent or subsidiary relationship with another company, except with wholly-owned subsidiaries.

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In The
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October Term, 1994

FEI, LTD., et al.,

Petitioners,

-against-

OLYMPIA & YORK BATTERY PARK COMPANY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS AND ORDERS BELOW

The Opinion of the District Court officially is not reported and appears in Appendix ("**App**") A at 1a. The United States Court of Appeals for the Second Circuit affirmed by Summary Order officially which is not reported and appears in App B at 21a. The Order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing *en banc* appears in App C at 23 a. The Order and Judgment of the United States District Court dismissing the action appears in App D at 24a.

JURISDICTION

The Judgment of the United States District Court for the Southern District of New York was entered on May 4, 1993. An appeal to the United States Court of Appeals for the Second Circuit was denied by Summary Order dated September 15, 1994. A timely petition for rehearing *en banc* was filed September 29, 1994, and thereafter was denied on November 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

As outlined in the Appendices, the following provisions are involved: 28 U.S.C. § 46, Second Circuit Quorum Rule § 0.14, Second Circuit In Banc Rule (Local Rule 35), FRAP Rule 35(b), and FRCP Rules 42(b), 49(a).

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

Subject matter jurisdiction in the United States District Court was grounded upon diversity of citizenship. 28 U.S.C. §1332. Respondent O&Y was alleged to be a corporation or other entity organized and existing pursuant to the laws of the State of New York. Defendant - Third - Party - Plaintiff INA was alleged to be a corporation or other entity organized and existing pursuant to the laws of the State of Pennsylvania. Petitioner FEI was alleged to be a corporation or other entity organized and existing pursuant to the laws of the Republic of Ireland. Petitioners, John J. Fogarty and Jean Fogarty were alleged to be citizens resident in the State of New York.

B. Nature of the Case, Course of Proceedings, Disposition Below

FEI, Ltd., John J.Fogarty and Jean Fogarty (collectively "**FEI**") petition concerning the dismissal of nearly $5M of claims against O&Y. The dismissal is grounded upon the court's December 23, 1992, analysis that the "basic issue" before the jury at a nearly six (6) week 1988 trial (the "**O&Y Trial**") was "**What O&Y agreed to pay**". App A at 4a, etc. However, this contention is unsupported by the record, indeed, contradicts all prior substantive proceedings, *viz.*, trial severance rulings, instructions to charge, closing arguments, a special verdict with interrogatories and two (2) prior, lengthy written Opinions, none of which remotely present any such analysis. Rather, all prior proceedings support these events: a trial exclusively upon O&Y's claim for an alleged $13.5M "overage" upon a "fixed-price" contract; an FEI defense grounded upon O&Y contributory

responsibility; the court's trial ***severance "upon consent"*** of FEI's claims and a subsequent jury verdict of FEI responsibility for approximately 2-4% of O&Y's losses, *i.e.*, the remainder of O&Y's "overage" claim refuted.

* * *

In February, 1985, O&Y, as Developer/Contractor of the World Financial Center Project, Battery Park, New York (the "**Project**"), commenced this action upon an alleged breach of contract relating to two (2) performance bonds issued by INA in favor of O&Y in the total amount of approximately $10.5M. Petitioners, John J. Fogarty and his wife, Jean Fogarty, entered personal guarantees to INA upon the bonds. O&Y had entered into subcontracts valued in the approximate amount of $10.5M with FEI concerning Buildings "A" and "C". A 421, 432.[2]

Project difficulties culminated in a November, 1984, meeting between O&Y and FEI. A 105, etc. At this time, O&Y was obligated to FEI upon Buildings ("*Bldgs*") A and C in an amount in excess of $700,000 for "retention", an amount due to be paid to FEI in February, 1985. O&Y and FEI entered upon a written understanding for completion of the Project, essentially through O&Y's financial advances and assurances, e.g., by O&Y senior executive, O. Blau, that FEI "would not get hurt". A 181, etc. Nonetheless, in February, 1985, O&Y did *not* return FEI's retention, as contractually obligated, but rather commenced this action against INA. Thereupon, INA impleaded FEI and Mr. and Mrs. Fogarty upon the bond guarantee. A 263, 273-76. In April, 1985, notwithstanding that for work, labor and services FEI had incurred in excess of $473K upon Bldg B Tower, O&Y terminated

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[2]INA had bonded the performance of FEI for two (2) buildings, "A" and "C". At least initially, FEI was to manufacture, deliver and install stone cladding upon the exteriors of the four buildings. Difficulties arose concerning Bldgs A and C relating to the supply of stone provided to FEI from an O&Y affiliate, a Canadian supplier, Granicor, Inc. ("**Granicor**") and relating to an O&Y switch in construction priority from Bldg A to Bldg C which occurred subsequent to a 1984 sale of Bldg C by O&Y to the American Express Company ("**Amex**") for in excess of $478M. A 50.

FEI upon all of Bldg B; more, in consequence of FEI's nearly $800,000 in documented claims upon Bldg "D", O&Y reduced FEI's participation upon Bldg D. A 25-27, etc. It was not until virtual completion of construction upon Bldgs A and C (April, 1986), that O&Y terminated FEI upon Bldgs A and C. A 258-59.

In June, 1986, FEI filed a Third-Party complaint against O&Y asserting claims concerning the *four* (4) building Project. A 3, 10-44, etc.[3] The trial transcript records the court's ***mid-trial severance*** for subsequent separate jury trial of FEI's claims, together with the court's directed shift in focus of ***all*** evidence, testimony and argument from FEI's complaint allegations *to* FEI defenses to O&Y's claim. (App P at 63a-69a). Subsequently, the court directed that special interrogatories be submitted to the jury. The jury answered that FEI was responsible for $600K of O&Y expenses. (App I at 33a). By Opinion dated September 19, 1988 ("**Opinion I**"), the Court denied O&Y's motion for judgment notwithstanding the verdict. (App J at 35a).

In October, 1988, the Court directed FEI to document"chapter" and "verse" written support for its claims (the "**'Chapter and Verse' Submissions**").[4] By Opinion dated June 2, 1989, ("**Opinion II**"), the Court dismissed INA upon grounds of material alteration of the bonds and denied O&Y's motion for reargument of O&Y's motion for judgment notwithstanding the

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[3]FEI encountered substantial difficulty pre-trial, particularly in context of voluminous document exchanges and court directed time limitations which precluded any FEI deposition upon any Bldg B and D claim. In consequence, *not a single witness presented by O&Y at trial*, including O&Y's expert, *had been deposed*. Notwithstanding request, particularly including repeated request for R. 37 hearing, the court did not implement any R. 16 "pre-trial order" ("PTO") procedure; also, the court denied FEI's motion for stay of trial and R. 37 hearing, notwithstanding prejudicial O&Y pre-trial abuses. A 45-103.

[4]Notwithstanding that O&Y had presented "counter-claims" in excess of $2M concerning Bldgs B and D and that FEI had been precluded any deposition upon any Bldg B and D claim, O&Y was not required to present any support for its claims. FEI's Chapter and Verse Submissions were presented in November, 1988. (A 217-19, 224-310). (App K at 46a, P at 69a-72a, and R at 76a-79a).

verdict.[5]. (App L at 49a). On February 11, 1992, the Court directed a two-week, August, 1992, trial of FEI's claims. A 397-411. (App R at 86a; see also Apps N at 58a and O at 61a). FEI prepared for trial and appeared at the scheduled date and time, but was advised that a trial had *not* been scheduled. App R at 86a; see also App N at 58a and App O at 61a. In December, 1992, at a conference, the Court dismissed FEI's claims grounded upon purported failure of stated objection to the special interrogatories, notwithstanding recognition that issues of fact remained outstanding, e.g., relating to FEI's claim for taxes ($1M) and overhead ($900K). (App A at 1a). Nonetheless, FEI's claims - those initially sought to be presented during the O&Y Trial - have been preserved for trial as ***severed***, indeed, ruled by the court to be "***out of the case***". A review of the trial transcript (March, 1988) so records (App P at 63a):

I All Evidence, Argument, of FEI's Claims *NOT* To Be Presented To Jury

THE COURT:... *Now, what I am going to rule is this*: That from here on out *until* further notice, the *evidence is to be directed*, both direct...and cross..., to the *stone problem and the changes in building priorities*.... All further cross-examination of Mr. Fogarty, Sr., will be directed to that point, and those points and *those points only*. *All further presentation of additional witnesses by FEI will be limited to those points*... (A 116)....

[I] am going to... *tell the jury* that I have ruled in this way.... I want to have them and the attorneys *focus only the two problems* which really they will have to decide, and *only those problems will resolve this case*. [T]hey are going to be asked to *switch their consideration* for the time being away from these issues. They will hear about the stone problem and the switch in priority problem,...and that's the way we will proceed. (A 117).

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[5]Notwithstanding O&Y's erroneous August 17, 1992, contention, there was *not* pending any O&Y post-trial motion for "summary judgment" or "judgment" nor has any such motion(s) ever been presented. A 401.

MR. O'CALLAGHAN: The other point, your Honor,...*the claims we began to develop*..., the excess wage claim..., *B and D* issues which began to be presented, *they are going to be put on the back burner*?

THE COURT: *Yes, absolutely*. (A 118-9);

FOGARTY, resumed. (Jury present). (App P at 64a).

THE COURT: In my view *the case rests...on this question of the stone problem and the switch in priorities. That's as far as you are concerned right now*.... (A 124)... *Does the defense case rest*?

MR. O'CALLAGHAN: *To the extent*, your Honor, *you have limited the trial* to the issues --

THE COURT: *I understand*.

MR. O'CALLAGHAN: Yes, we do. (A 128). * * *

II "You won't have a jury".

MR. O'CALLAGHAN: More or less in midstream in the case...you essentially directed that we all turn out attention to the stone to hit heart of the case. Now, FEI at that time was right in the middle of presenting its claim...(A 129), but all that was abbreviated. In fact, it wasn't presented, and so I have reflected on this because in order for FEI to present these claims, it is going to take some time....

THE COURT: I'll tell you, Mr. Callaghan, you are not going to have a jury...*You won't have a jury*. I freely concede that in order to get this case confined to what I think... you can't have a lot of people sitting in a jury who are feeling like they are chained to their seats and they are totally unwilling, you don't want that. Now, I was pretty confident that in order to get this case into a span which was workable, that we had to somehow arrive at some reasonable definition of the issues.... (A 130-31). (App P at 65a). Now, *as far as your counterclaim for damages*

for breach of contract, if you are telling me that you need several more days to present that, I'm telling *you won't have a jury*, and I *will simply sever it and we will call another trial*, because it is not practical....*[S]o we have limited the issues, and so be it*....

MR. O'CALLAGHAN: [M]r. Fogarty, Sr. was testifying...and we had some voir dire, and the jury was asked to leave, and that's where the focus of the case shifted to stone again.... (A 131-32).

THE COURT: ...[I] don't believe you were ever cut off or prevented from showing....Now, you look at the record, and if you were prevented and cut off, well, I will stand corrected. *What I was trying to cut off wasn't your showing the back-up for your damage items*.... (A 133-34). But you can read the record over and *correct me if I am wrong*. The point is that you have rested your case and, I don't think you were prevented from putting anything on about your damages that you wanted to put on. Before you go any further, you study the record. A 135-36.

MR. O'CALLAGHAN: I have an understanding of it...and I represented at that time we had claims to discuss, including the anticipatory breach on Building B and D, and when I rested my case, it was on the understanding it was being *rested on the A and C stone issue alone*.

THE COURT: I think you better re-study the record. I don't think that's a faithful recital of it....One way or the other, *we will get this jury instructed by the end of the day tomorrow*. (A 136). (App P at 66a-67a). * * *

III Severance: "The Third-Party claims [are] really out of the case"

MR. O'CALLAGHAN: Last evening we had some discussion about FEI's claims and I went through the transcript....I made three pages.... [A 116-119].. close on [A 128].

THE COURT: All right. (Pause) *Well, you are absolutely right. Absolutely right*. So what do you propose?... (A 137).

MR. O'CALLAGHAN: [I] have no choice but to ask that they be *severed and tried at a later time*.

THE COURT: You are certainly right in your memory of the transcript, and you have shown it to me. And we have to deal with it in a sensible way.... (A 138). And what is *O&Y's position* on that?

MR. SELTZER: *We agree to the severance of FEI's third party claims against O&Y.* We agree to the severance.

THE COURT: The *application is granted on consent....*

MR. O'CALLAGHAN: One further point, your Honor. May I ask that the court provide some *instruction to the jury* about FEI's claims in whichever way is appropriate.

THE COURT: *Sure. I will do it.*

MR. O'CALLAGHAN: They will be held in abeyance.... (A 139).

THE COURT: ***The matter of the third party claims is really out of the case. I think it would be most confusing to bring that up***. Let's bring in the jury. Thank you all very much.... (A 140).

* * *

THE COURT: All parties rest now?...(A 141)

O'CALLAGHAN: With the only reservation we had --

THE COURT: What we discussed this morning?

O'CALLAGHAN: Yes. (A 142) (App P at 67a-68a).

FEI's claims as so "severed", "out of the case", "confusing", thus, removed from jury consideration, thereafter were precluded from even an offer of proof. A 370-85. Thereafter, in the Chapter and Verse submissions, FEI presented support for its claims:

> "Upon a nearly six (6) week jury trial... O&Y was provided with more than full opportunity for presentation of its claims. Meanwhile, after it became apparent that O&Y's...claims for in excess of $13 million quickly and rightfully were evaporating before the jury,... under Court direction, FEI's claims were severed upon assurance for a subsequent, separate trial... [A]t no time...was there any doubt... that the case was being presented to the jury other than exclusively upon O&Y's claim for "overage"...against which FEI was limited expressly to presentation of some defenses...*[F]EI was limited by the Court to a defensive action, not to presentation of affirmative claims*. Notwithstanding a jury verdict which vindicated FEI...nonetheless, immediately thereafter,...repeatedly and unfairly the Court characterized FEI as in "default"....
> [J. Fogarty] A 408. (Emphasis added). (App P at 69a-70a).

In consequence of O&Y's refusal to continue settlement discussions, FEI obtained a conference (February, 1992) at which *the court scheduled a trial* of FEI's claims for the last two (2) weeks of August, 1992. A 386-397.[6] On August 17, 1992, FEI appeared for trial. O&Y was not in attendance. A trial in another matter was in progress and FEI was advised that a trial of FEI claims was not scheduled to proceed. This was the first and only communication from the court that the August, 1992, trial of FEI's

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[6]FEI provided notice of its $800K *Bldg D* claim by letter dated July 5, 1985, the letter *annexed to FEI's complaint*. Nonetheless, O&Y's *uncontested* reluctance to address for settlement virtually all "D" claims is referenced in one of the several "settlement analyses" exchanged between the parties, in particular, with O&Y's President, *John E. Zuccotti*, referencing O&Y's "deal-breaker" insistence concerning O&Y's $1.9M of "D" claims, those never set forth "Chapter and Verse", nor so required by the court. A 365, etc.; see also, n. 11, *infra*). In addressing FEI's $800K Bldg D claim, uncontestedly, Fogarty stated:

> During...preliminaries to the settlement discussions, O&Y indicated an unwillingness initially to address FEI's...Building D [Claim],...[I]n the [Chapter and Verse Submissions] deponent made reference...in context of the "B/D Gatehouse". [A 289, 302-05] This ...claim...contained in FEI's pleadings...has not been withdrawn or abandoned but remains pending, as *severed* .... A 409-10. (App P at 70a-72a).

claims had been rescinded. A 399-400. (App P at 72a).

In Opinion I, the Court had stated:

> [W]ith regard to the $600,000 found by the jury...this amount was awarded with respect to the *post*-termination expenses. [I]t is clear that the jury awarded nothing for the pre-termination expenses, and did not make an award with respect to the loan.... (App J at 36a).

In Opinion II, the Court had stated:

> [T]he court's instructions...explained *the nature of the basic problem*. The *essential issue was whether FEI had defaulted* in performing under the contract *and whether O&Y had sustained loss or damage by reason of such default*. It was further explained...that O&Y was not making its case in regard to default by way of contentions about specific construction defects, delays, etc. O&Y had pitched its case *solely* on the contention that FEI's default consisted of becoming financially unable to perform.... (App L at 50a)
>
> All...*contentions of O&Y ignore certain prominent uncontradicted testimony presented by FEI*, testimony which the jury asked to have repeated .... [O]&Y... *virtually begged FEI to stay on the job* and to perform at the increased level of production. O&Y assured FEI that it *would not be hurt and that it would be made whole*... (App L at 52a).
>
> [T]here was ample evidence to support a finding that *all payments made prior to FEI's termination in April 1986 were such agreed upon adjustments*.... [T]he jury was justified in concluding that much of the additional expense, *over and above* the formal adjusted price of *$14.1 million*, was *due to O&Y's own mismanagement regarding the granite supply and other circumstances* which were caused by O&Y and which *should not be charged to FEI*... (App L at 52a).
>
> [T]he *jury could well have found that FEI's financial problems...related to its difficulty in meeting O&Y's increased*

demands, rather than requirements under the original contract, *and that what occurred was an alteration and adjustment of the contract* ***rather than a default*** *by FEI*. Of course, the jury found that at some point there was a default by FEI resulting in damages to O&Y of $600,000.... [I]t is well to keep firmly in mind that the default relied upon by O&Y was the occurrence of financial inability on the part of FEI. The jury obviously had the discernment to see that this kind of default could hardly operate to magnify this project from one in the range of $10-14 million to a $22 million or a $27 million project. Those ***enormously increased costs must have been due to factors other than FEI's financial inability, and the jury so found***.... (App L at 53a). (Emphasis added).

However, upon dismissal, inconsistently, the court stated:

THE COURT: [A]ccording to my analysis: ***Overhead, $900[K]; Taxes, $1[M] Retentions, $1,059,150***.... A 324. It seemed to me an obvious first question about the *$900,000* was, ***was it included***.... ***I really can't tell***. ***I don't know***.... If it wasn't included, then maybe there is some reason to talk about an additional claim for this additional, extra, separate amount, so called.... A 327. [A]gain, I will stand corrected on that if you find me something in the record where Mr. O'Callaghan said: The $900,000 overhead claim is withdrawn from the jury in this action.... A 328. [I] want to cover the tax reimbursement claim of a million dollars. Everything I have said about overhead applies to that.... A 330. Show me in the record where you reserved the $900,000. (App A at 3a-6a).

MR. O'CALLAGHAN: I have a recollection -- this is today, as we sit here, after many years -- that the jury, certainly counsel, but I recall as well the jury, was *directed to limit the case* essentially to the stone issue and only to the stone issue and to see the case through that perspective.

THE COURT: That has nothing to do with what the amount of the adjusted contract price is.

MR. O'CALLAGHAN: I think there was a further ruling *precluding all evidence* other than relating to the stone, which

essentially diluted and *vitiated any need* or requirement or interest *in FEI of presenting any further claims*. (App A at 8a). ...It has always been my argument at least that any additional funds that...[O&Y] advanced they did so for their own account, to their benefit, and they withheld the retention and withheld it and sued at that time.... (App A at 8a).

THE COURT: ...If $800[K] was presented in those materials and somehow I have ignored it, I will be glad to have my attention called to that mistake.... (App A at 13a). *...I think it is a shame to consume the time of the Court and the time of O&Y* and have all this litigation expense on that. I think the action should be over with. But I don't see my way to ruling a matter of law on a summary judgment... (App A at 14a). ...The party who came out of that trial really badly was O&Y. *You came up swimmingly. Let's just talk about the possibility of an appeal after a final judgment. You can't do anything on appeal, nothing....* (App A at 18a). *[U]nless you have something really very clear in the record that carves certain things out of the trial, you haven't got anything you can say on appeal*. So what has happened is that you have come out of a jury trial with a verdict which is so small that you should be saying prayers of thanks, and you have these tag-in things that you are trying to bring up. They are really not worth very much. Your client somehow is going to end up owing O&Y six figures, and if there was ever a reversal on appeal, maybe seven figures. So if your client could cooperate with O&Y in arriving at some basis for settlement.... (App A at 19a).[7] (Emphasis added).

Oral argument upon FEI's appeal was heard December 22, 1993 (the "**Oral Argument**"). (App S at 87a). In pertinent part,

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[7]Additionally, the court stated: "[I] finally put it down for trial *and then we had a conference*, and your colleague came in and reminded me that I had some homework to do...." (A 340). Rather, notwithstanding O&Y's February, 1992, conference objection, the court scheduled FEI's claims for an August, 1992, trial. In the interim, there did not occur any conference, nor communication to/by FEI and the court concerning a rescinding of the scheduled August, 1992, trial, rather an FEI July 28, 1992, letter to the court of trial readiness. A 365-67. (App R at 86a).

the Oral Argument records:

Timbers, J.: ...You, quite properly representing your client, attacked the district judge. .... **[D]id Judge Griese do anything right in this case**?

O'Callaghan: ...[T]he trial...was fair. ...[S]everance...was unfair. (App S at 88a).

McLaughlin, J.: Is it perfectly clear on the record that your claim was severed?

Winter, J.: Would you give us the page number in the appendix where the severance occurred pursuant to the order?

O'Callaghan: Yes, your Honor, if you give me a moment.

Winter, J.: I thought that would be at the tip of your tongue.

Timbers, J.: ... I'm asking where....138 and 139. Read....

O'Callaghan: ....judge says, "The application is granted upon consent." [L]ater,...the third-party claims were out of the case....

McLaughlin, J.: The relief that you want is simply a trial on your, ... third-party complaint.... That's all you want? (App S at 89a-91a).

Timbers, J.: You've asked for a new trial before a different judge...? ....[H]aving been a trial judge, there's nothing more undesirable...than what you see...the last sentence, "demand [sic] for trial before a different judge." .... Judge Griese probably made mistakes or errors, but that doesn't mean he's not competent to retry it. You say yourself it's a fair trial.

O'Callaghan: I have no doubt the trial was fair. My concern was the judge's lack of interest and the mechanisms by which he facilitated my necessity for taking this appeal. Characterizing the case as everything...[O&Y] agreed to pay just was not true, not accurate....And setting the case for trial...in...August...then when I appeared..., he just wasn't going to grant a trial and then six more months...to...appeal while...[O&Y] is in bankruptcy all over the world except New York. I think it would be fair before a different judge.

Timbers, J.: You made your point. (App S at 92a-93a).

Bernstein: .... So while it is true that there was a severance of FEI's claims, what is absolutely clear...is that all of FEI's claims on buildings A and C...went to the jury....

Winter, J.: I just don't understand how you could have let that happen. ...[I]f the claims are severed, why didn't you object to relevancy? (App S at 94a).

Timbers, J.: The judge made a finding, ...that...claims to overhead and tax...were considered by the jury and incorporated in this verdict. ....How could that have been?

Winter, J.: ...[W]as the jury asked specifically to make separate findings on overhead, retention and taxes?

Bernstein: Not at all.

Winter, J.: ...**So we have irrelevant evidence that went in and there's an assumption that the jury felt it was relevant and rendered a judgment on certain claims it wasn't told about**....

Timbers, J.: **That's what the judge said**.

Bernstein: Excuse me? ... The judge said either these claims...were within what the jury found... or he says I can't,...tell one way or the other..., then FEI never took it out from the jury's consideration. ....

Winter, J.: **It's not up to FEI to take something out of the jury's consideration, it's up to the judge**.

Bernstein: **The judge didn't do it either**.

Timbers, J.: **Maybe he was clearly wrong. Why don't you admit that**? (App S at 95a-97a).

Winter, J.: There was nothing expressed in the record that took it out. What do you mean by that?

Bernstein: The judge asked...repeatedly, "Show me in the record...where it is that I said that your claim for taxes, retention and overhead was taken...from...the jury." And all Mr. O'Callaghan said was, "**You severed my third-party claims. Well, it's true**.

Winter, J.: **That's what he's saying here**?

Bernstein: **That's right**.[8]

McLaughlin, J.: **Isn't that enough to take it out**?

Winter, J.: .... When they appealed, why couldn't you have cross-appealed?.... Why aren't you arguing that he can't appeal? (App S at 98a-99a, 102a).

Winter, J.: **The burden of your argument, as I understand it, is that the Partnership claims,[9] although severed, were, in fact, the basis for the jury verdict**.

Bernstein: **In fact, with respect to buildings A and C, correct**.

McLaughlin, J.: **The evidence went in. It was charged to the jury, it was summed up and everything, even though there was a severance**. (App S at 104a-106a). (Emphasis added).

* * *

Thereafter, on January 4, 1994, the parties filed letters pursuant to direction relating to Rule 54(b) jurisdiction. (Apps T and U, at 112a-120a; *see also* App M at 56a). Six (6) months later, on June 24, 1994, FEI presented to the Court a letter addressing the delay in issuance of a decision.[10] Upon review of a copy of the September 12-18, 1994, *Crain's New York Business*, Vol. X, No. 37 ("***Crain's***"), front-page headline: "**Bankruptcy feared at O&Y**...", with report of a bankruptcy proceeding scheduled for September 16, 1994, FEI filed a *Motion to Expedite Decision* on September 15, 1994, at 11:39 a.m., including as "Ex A", FEI's June 24, 1994, letter. (App V at 121a). At 3:30 p.m. on the same day, September 15, 1994, FEI was advised that a

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[8]See App Q at 73a and App R at 76a, in particular, App R at 83a-85a in reference to Apps F and G, at 28a-31a).

[9]"*Partnership claims*" were *not* presented for review upon this appeal.

[10]FEI's letter was received by the Clerk with multiple copies, but was not recorded upon the Circuit Court's public docket. (App V at 126a).

Summary Order dated the same day, September 15, 1994, had been filed, thus, the Motion to Expedite Decision returned, undocketed. (App V at 130a).

On September 21, 1994, FEI filed a "Motion Relating to En Banc Rehearing" requesting (i) a statement of the grounds and date of the recusal; (ii) a statement of the grounds for the delay in issuance of the Summary Order and the timing of issuance in context of the report of bankruptcy proceedings; (iii) an extension of time and increased page limit relating to a Petition for Rehearing, En Banc (the "**En Banc Petition**"); and (iv) permission to include as exhibits to the En Banc Petition, *inter alia*, copies of the court's two (2) lengthy Opinions, and transcripts of the December, 1992, conference dismissal and 43-page (45-minute) December, 1993, oral argument before the Circuit Court (the "**Motion Re: En Banc Hearing**"). (App W at 131a). This motion was denied by undated order -- absent seal -- the denial docketed on October 11, 1994 (App X at 136a), i.e., subsequent to the September 29, 1994, filing of FEI's En Banc Petition.[11]

REASONS FOR GRANTING THE WRIT

A. In Both Procedure of Issuance and Substance of Ruling, The Summary Order Evidences Fundamental Unfairness

The Oral Argument records the Circuit's discussion of the clear, reversible error evident within a voluminous record concerning the lengthy O&Y Trial; more, the absence of support

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[11]Subsequently, in the December 5-11, 1994, issue, *Crain's* reported:

O&Y pay battle slows deal
Execs salaries, bonuses rapped
Olympic salaries

1994 compensation at Olympia & York

	Base Salary	Bonus
John E. Zuccotti President and Chief Executive	$1.5 million	$562,000

for any contention that "What O&Y Agreed to Pay" was a feasible justification for the December, 1992, conference dismissal of $5M of FEI trial-severed claims. The parties' January, 1993, letter submissions removed any possible jurisdictional challenge. Thereafter, in context of the extraordinary facts and circumstances outlined, the *nine (9) month* delay in issuance of decision upon the appeal, *alone*, raises significant question concerning justification -- and explanation -- for such delay. More, the affirmance by exceedingly brief Summary Order, the denial of docketing to the Motion to Expedite Decision, the unexplained recusal announcement contained solely in the Summary Order -- all on the eve of a publicly reported proceeding relating to a possible O&Y bankruptcy -- transformed already significant questions relating to delay (and prejudice) upon the appeal into serious questions of fundamental fairness.

The Circuit's own procedures and precedents *preclude* "recusal" announcement *nine (9)* months after oral argument, *see* opinion upon rehearing in *Murray v. National Broadcasting Co., et al.*, No. 93-9335 (No. 1566) (2nd Cir. Aug. 12, 1994) (recusal under statutory authorities, viz., 28 U.S.C. § 46 and Second Circuit Quorum Rule § 0.14(b) *may* be authorized "*immediately before* oral argument") (Apps BB at 141a, EE at 142a, FF at 143a).

Such recusal as occurred in this action, particularly because absent all stated grounds and announced so long after oral argument, *prejudicially* affects *en banc* rights upon request for rehearing, i.e., pursuant to FRAP R. 35(b) and Second Circuit Local In Banc Rule 35 (Apps CC at 141a and DD at 142a) because to be "heard or reheard" *en banc requires* that "a judge ... who was a member of the panel that rendered a decision ... requests a vote....", FRAP R. 35(b) (emphasis added). Thus, a recusal in the manner outlined in these proceedings effectively precluded any true *en banc* possibility; moreover, availability for *dissent*, with obvious *en banc* consequence, unfairly was mooted. For these reasons -- at least -- the grounds, manner and timing of recusal

publicly should be stated.[12]

B. There Was a Severance of FEI's Claims; The O&Y Trial Was Not About "What O&Y Agreed To Pay"

Severance is to avoid prejudice, not create it. R. 42(b); *United States Gypsum Co. v. Shiavo Bros., Inc.*, 668 F.2d 172 (3rd Cir. 1981). Truly, a "scandalous" waste continues, that of any objective review of a record which shows nothing other than that a litigant, FEI, has been precluded from presentation of meritorious claims upon court 1988 assurances of a fair and impartial, severed jury trial; thereafter, the facade of a useless, nonetheless, urged, settlement strategy and the subsequent unfair denial of any trial upon grounds retrospectively posited as legitimate, notwithstanding manifestly in conflict with two (2) earlier Opinions and 1988 trial rulings. The court's discretion for severance does not include a change of decision and dismissal absent trial before the trier of fact and absent fair opportunity for presentation of proof. *See generally, Knapp v. McFarland*, 457 F.2d 881 (2nd Cir. 1972). Indeed, FEI's claims are supported in the "Chapter and Verse Submissions":

> (a) During the [pre-termination period]...O&Y failed...to pay...FEI's *overhead*,...as *agreed*,....(b) Similarly, for... *withholding tax* ... imposed upon FEI ...in breach of O&Y commitment to compensate FEI for this obligation....(A 229-30). (App R at 76a).

> [O&Y] PX 15 admits that the amount of *$1,589,225* was due FEI...but *not* paid, a substantial portion of which amount is comprised of the A/C Retention....(A 104, etc.) ....*[O]verhead* ...reimbursed...directly...and/or monies FEI

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[12]In the December, 1994, *New York Times* report of Honorable William H. Timbers' death, there was mentioned that Judge Timbers continued to hear appeals through June, 1994. Respectfully, the circumstance of Judge Timbers' death should not affect the merits of this Petition's "recusal" issues.

would earn...upon Buildings B, D....[13] (A 288-90). (App R at 77a).

Notwithstanding the court's view that "O&Y has more than made up this deficiency" (A 190) (i.e.,failure to credit/return FEI's $735K Bldgs "A/C" Retention), indisputably, O&Y's *pre*-termination advance was for "new work", was performed at O&Y's request and for O&Y's benefit, thus, for O&Y's account.[14] Likewise, indisputably, FEI's Bldgs A/C Retention was earned during an *earlier* period, i.e., earned prior to the pre-termination advance. (A 237).[15]

In the nearly 3500 page trial transcript and 1000 page

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[13]Notwithstanding the court's declining to recognize any theory of recovery grounded upon FEI incurred *expenses*, e.g., overhead, (SA 136-37), nonetheless, well-known theories exist, e.g., the **Eichleay** formula, *see Eichleay Corp.*, 60-2 B.C.A. (CCH) ¶2688 (1960); *accord S. Leo Harmonay, Inc. v. Binks Mfg. Co.*, 597 F.Supp. 1014 (SDNY 1984), *aff'd* 762 F.2d 990 (2nd Cir. 1985). *See also, George Hyman Const. v. Wash. Metro. Transit Auth.*, 816 F.2d 753 (D.C.Cir. 1987) (proof by impairment of capital); *Peter Kiewit Sons Co. v. Summit Construction Co.*, 422 F.2d 242 (8th Cir. 1969) (proof by actual costs).

[14]More, O&Y's failure to make retainage payments was a material breach, excusing FEI. *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 248 U.S. 334, 39 S. Ct. 102, 63 L.Ed. 275 (1919). Notably, the absence of FEI's acceptance of "final payment" preserved FEI's retention claims. *Najjar Industries, Inc. v. City of New York*, 446 NYS 2d 302 (A.D. 1 Dept., 1982), *aff'd* 454 NYS 2d 65, (Ct. App., 1982).

[15]O&Y's *subsequent* "pre-termination advance" was not documented by O&Y as "payment" for retainage, was not *pled* as a "payment" affirmative defense and should not now be "credited" retrospectively to O&Y's benefit. More, *O&Y has conceded* that $735K in retention was neither "credited" to FEI nor part of the now posited "Everything O&Y agreed to pay" theorem. Convincingly, in O&Y's **Answer** to FEI's claims (July, 1986), O&Y included fourteen (14) affirmative defenses, none of which are identified as "payment", rather one (¶51) identified as a *concession of non-payment*! In ¶51, O&Y admitted that the retention was intended to be tried *separately* as an off-set to O&Y's Ex. 15 damage submission. Simply, in 1986, O&Y anticipated that the trial *could not* be about "what O&Y agreed to pay", rather, that FEI's retention, an "*acknowledged adjustment*", would have to be *returned*, notwithstanding any "advance" in its own interest O&Y might provide. (App R at 78a).

supplemental record, there does not appear any contention that the jury was requested to give a verdict upon "what O&Y agreed to pay": no one heard, argued or charged upon such theory, nor was such theory contained in either of two (2) lengthy Opinions nor therein remotely referenced. This contention appears first and only at the December, 1992, dismissal conference.[16] (App A at 4a). The court's analysis concerning "renegotiation" of O&Y's pre-termination advances - [or "waiver", as FEI has contended (A 182)] - into a court "adjusted" Adjusted Contract Price" of $22M does not provide assistance to O&Y. Precisely, this is what the jury so concluded in rejecting all O&Y pre-termination expenses because not proven incurred *by/for FEI*, rather, acknowledging reimbursement solely of limited *post*-termination expenses, ($600K), found reasonable, i.e., not extravagant. The court instructed the jury concerning O&Y's "damages" summary, "Ex 15" (App H at 32a):

> [I]t's up to you *whether it is an accurate summary*, and it is up to you to determine *whether payments and expenses* over and above the contract price *were reasonably incurred. If they*

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[16]Significantly, it was only upon appeal that O&Y championed the court's analysis of jury verdict "adjusting" the "Adjusted Contract Price" from $14M to $22M. Upon appeal, O&Y contended (O&Y Br. at 22):

> "[T]he issue of what O&Y agreed to pay FEI -- *i.e.*, the "adjusted contract price" -- was covered by Special Interrogatory Number 3.... In order to answer this question, the jury had to determine what the "adjusted contract price" was. *The "adjusted contract price was, of course, the total amount price that O&Y had agreed to pay FEI."*

However, throughout the 1988 trial and in all argument prior to the 1992 dismissal, consistently, O&Y had argued that the "Adjusted Contract Price" was $14M. As stated in **Opinion I**: "*[A]ccording to O&Y*, the undisputed evidence at trial revealed that the *adjusted contract price* was $14,109,745...". (App J at 36a) Likewise, **Opinion II** confirms O&Y's consistent $14M Adjusted Contract Price contention, i.e., until the appeal:

> "[O]&Y argues that no issue or evidence was presented to the jury which could in any way allow it to find that the adjusted contract price was $22 million. *O&Y contends that the adjusted contract price was conclusively established as being $14.1 million and that indeed the court so instructed the jury.*" (App L at 50a).

> *weren't incurred or if they were simply extravagant*, they are not reasonably incurred.... (T 3296-97)

The jury did not "credit" to O&Y reimbursement for expenses which either "weren't incurred" or "were simply extravagant". Consistently, the court confirmed this jury determination of extravagance, e.g., in Opinion II:

> [In Ex 15], O&Y presented the figure of $14.1 million as being the adjusted contract price and presented other figures indicating that $12.9 million had been spent over and above that adjusted contract price. However, *the court did not in any sense instruct the jury that it should accept any figure from that exhibit and told the jury that they should determine whether the figures were accurate*.... [T]he jury was justified in concluding that *much of the additional expense*, over and above the formal adjusted price of $14.1 million, *was due to O&Y's own mismanagement*...which *should not be charged to FEI*. (App L at 50a-52a).

Thus, the jury concluded that O&Y waived expenses both below and above the "Adjusted Contract Price", or otherwise was responsible for its own purported additional expenses.[17] *See Gross v. Black & Decker (U.D.) Inc.*, 695 F.2d 858 (5th Cir. 1983). The "basic issue" before the jury was not "what O&Y agreed to pay", rather, what was the default of FEI, if any, and at what amount of loss or damage to O&Y. The trial addressed what O&Y contended it sustained as damages - a contention summarily rejected by the jury, excepting in *de minimus* amount - not what O&Y "agreed to pay".

C. There Was Absent Rule 49(a) Authority For Dismissal

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[17]FEI presented a defense to the Bagnelstown loan: "[T]he *defense of payment*. .... [T]he loan...was or should have been satisfied from ...Retention[s].... [O]&Y's contention that it was authorized to apply Retention[s] to whatever use O&Y chose is prohibited by the Contract... ...*FEI was precluded from presenting any evidence*...." (App R at 85a).

Waiver of jury trial right upon use of special interrogatories occurs only upon questions presented without objection which are raised by the pleadings or evidence. Implicit in the statement of the rule is its context of pleadings and evidence submitted to that jury. *See generally, Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982).[18] Here, there was both objection and severance - FEI's claims were "*really out of the case*".[19] Indisputably, the jury found that: (i) O&Y substantially did *not* perform its obligations with respect to stone supply; (ii) *this* O&Y failure did *not* cause an FEI financial inability to perform, and (iii) the amount of expenses O&Y reasonably incurred "above the adjusted contract price" to complete or repair FEI's work...was...$600K. A 174-75. Thus, the jury determined that FEI was *not* in default: a $600K additional O&Y expense, only 4% of O&Y's trial evidenced Adjusted Contract Price, $14,109,745, indeed, only 2% of O&Y's total construction cost, $27M. Accordingly, there was *not* a material breach of contract by FEI.[20]

D. FEI Substantially Performed

In April, 1986, O&Y had incurred expenses approximating $22M for Bldgs A and C. Definitively, the jury did not award a

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[18]Once the court decides to submit special interrogatories, the court "must cover all material factual issues". *Matine v. Union Pacific R., Co.*, 714 F.2d 1028 (9th Cir. 1983). *Accord, Cutlass Productions, Inc. v. Breyman*, 682 F.2d 323 (2nd Cir. 1981).

[19]As explained in *Taherzadeh v. Clements*, 781 F.2d 1093, 1098 (5th Cir. 1986), upon objection for failure to submit an issue: "[T]he district judge has no authority to make an express finding under Rule 49(a) concerning that same issue. See Wright and Miller, *Fed. Prac. & Proc.* §2507 (1971)."

[20]Moreover, the verdict requires disgorgement from O&Y of at least $1,589,225, the amount admittedly due FEI upon the Adjusted Contract Price, nonetheless, an amount admittedly not paid:

$14,109,745 "Adjusted Contract Price"
-12,520,520 "Amount Paid to FEI per contract"
1,589,225 [Amount due and unpaid], O&Y Ex 15,etc.

"penny" of such "pre-termination expenses" (SA 121) (App R at 82a), i.e., the $7.8M O&Y advance from the November, 1984, "formal" Adjusted Contract Price amount, $14M, to the April, 1986, *termination date* amount, $22M. Thus, the $600K jury damage award - 2.7% of the (April, 1986) court "adjusted" Adjusted Contract Price, $22M - was an insubstantial "default". Definitively, as of April, 1986, FEI substantially had performed and was entitled to recover upon its claims. *See generally*, *United States v. Zara Contracting Co.*, 146 F.2d 406 (2nd Cir. 1944) and *Buckley & Co. v. New York*, 505 N.Y.S. 2d 140 (A.D. 1 Dept., 1986) (contract price less cost of completion); *see also*, *Wade Lupe Const. Co., Inc. v. B & J Roofing*, 444 NYS 2d 245 (AD 3 Dept., 1981) (*quantum meruit* recovery authorized).[21]

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[21]O&Y terminated FEI upon **Bldg B** in April, 1985 upon contention for FEI default upon Bldgs A and C. (A 43, 280-85). However, FEI substantially had completed performance upon Bldgs A and C. As FEI partially had performed upon Bldg B at the time of O&Y's anticipatory wrongful termination upon Bldgs A and C, FEI may recover damages upon the Bldg B breach, including a reasonable profit, *see Kenford Co., Inc. v. County of Erie*, 502 NYS 2d 131 (Ct. App., 1986); *Wolf & Munier v. Whiting-Turner Contracting*, 946 F.2d 1003 (2nd Cir. 1992). Likewise, FEI may recover upon the **Bldg D** claim grounded upon substantial Bldg D performance, *see generally Alm v. Unified Church Structures, Inc.*, 403 NYS 2d 151 (AD 4 Dept., 1978).

CONCLUSION

There are serious questions raised concerning the fundamental fairness of both the issuance of the Summary Order and its content. Accordingly, FEI requests that this Petition be granted and in consequence that an order duly be entered which grants to FEI reversal and remand for jury trial of all FEI claims in at least the following approximate amounts upon the following Project Buildings:

Bldgs A and C:		**Bldgs B and D:**	
Retention	$735,213.	B Retention	$ 49,683.
Overhead	900,000.	D Retention	261,886.
Taxes	1,000,000.	W'garden Retention	12,368.
		B Tower	473,000.
		D Performance	796,000.

Further, FEI requests that such order duly be entered which grants to FEI judgment upon its Bldgs A and C breach claim, grounded upon O&Y Ex 15, in the amount of $1,589,225. For these reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 10, 1995

Respectfully submitted,

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APPENDIX A -TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECEMBER 23, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK,
Plaintiff,

-against-

INSURANCE COMPANY OF NORTH AMERICA,
Defendant,

-against-

FEI, LTD., et al.,
Third Party Defendants.

85 Civ. 1238 (TPG)

New York, N.Y.
December 23, 1992
5 p.m.

Before:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for plaintiff
BY: RICHARD C. SELTZER

DANIEL O'CALLAGHAN
Attorney for FEI

(In the robing room)

THE COURT: I am using this format, rather than dictating an opinion in my office, because you may have some points to make as I go along which address specifically what I am saying and were not included in the papers and correspondence that I have received. Also, I might have questions for you. Let me start.

It is my analysis that FEI is now presenting claims in the total net amount of $2,902,899. The components of this are as follows, according to my analysis:

Overhead, $900,000;

Taxes, $1 million;

Retentions, $1,059,150, broken down as follows: retentions on A and C, $735,213, and retentions on B and D and the Winter Garden, $323,937 -- for a total of $1,059,150;

Unpaid work on building B, $400,000.

If you add the 900,000, the 1 million, the $1,059,150, and the $400,000, you come to $3,359,150.

There is a loan outstanding, balance due from FEI to O & Y, of $456,251. The suggestion is that that should be paid out of the retentions, but anyway if you deduct that, according to what is proposed by FEI, you come to the figure of $2,902,899.

Now let me take up the items in order.

The overhead of $900,000. The claim of FEI is that, in connection with buildings A and C, there was an agreement to pay FEI $900,000 to cover FEI's overhead, and the claim is that that is something over and above what was found -- let me be more careful and more precise -- that was something that can be claimed now and asserted now for litigation and further trial, and that it is not taken care of or included in any amounts covered by the verdict.

What I have tried to do is to test that in several ways. There are two theories of FEI as to the nature of the agreement to pay the overhead.

It is said that that agreement was contained, or at least implied, in a letter of Mr. Blau dated April 21, 1984, and the claim is that there is a chart attached to that letter which speaks of a revised schedule of payments and there is some mention of overhead.

A second source of the alleged agreement to pay this separate amount of overhead is said to be some notes of an employee of 0 & Y by the name of Givitz [sic] [Griffiths], and there is also an affidavit of Mr. Fogarty. The theory is that, relying on the Givitz [sic] [Griffiths] notes and the Fogarty affidavit, that overhead is separated out from the contract price for A and C, and the overhead is to be paid as part of the price for buildings B and D, or in some other way different from payments on the contract for A and C.

In my opinion of September 19, 1988, and in the evidence, there is reference to an amount of $7,812,407. That represents -- and I don't think there is any contradiction about the figure -- the amount of expenses which O & Y incurred prior to termination over and above what I will call the formal adjusted contract price of $14,109,745. I am not going to go into explanations of these figures, and at the same time I don't expect that the lawyers should have all this committed to memory, but let's hope we are reasonably conversant with them, and I have a bunch of materials in front of me which I am relying on and I will help you out to the extent that you need it. But let me just try to go forward.

There was what I will call the formal adjusted contract price, the figure I just mentioned. Then the undisputed evidence is, to my memory and according to my records, that O & Y spent on A and C $7,812,407 above that formal adjusted contract price prior to the termination, which I think occurred in the spring of 1986. If you add the formal adjusted contract price now to the 7.8 million, you come up to about 22 million.

It was my analysis, in the September 19, 1988 opinion, that the jury must have found that the adjusted contract price was the sum of these two figures, equaling about 22 million, when they found that FEI had defaulted and they found what was the amount of money that O & Y reasonably incurred above the adjusted contract price. When they found the $600,000, it was my analysis that they had to be considering that the adjusted contract price for their purposes was what I will call the formal adjusted contract price, plus this 7.8 million.

It seemed to me an obvious first question about the $900,000 was, was it included in this $7,812,407? I really can't tell. I don't know. If it was included, then surely there is no

possible basis for some additional claim now for that $900,000. If it wasn't included, then maybe there is some reason to talk about an additional claim for this additional, extra, separate amount, so called. Things are a little vague as presented to me, and I don't think it is possible to literally tell.

But I want to come to something which is more important. What was being presented to the jury was evidence, speaking in a very basic way, about what it was that O & Y agreed to pay to FEI. I am not prepared to analyze all the summations and discuss with you exactly what components and analysis you all gave to that question. But question 3 submitted to the jury had, as one of its component elements, a finding of what the adjusted contract price was, and that meant not just what was on some single piece of paper but what did O & Y under all the facts, all the evidence, agree to pay? As I explained in my written opinion of September 1988, and as was evident to me from my view of the trial at the time, including questions that the jury asked at the last stage of their deliberations and evidence they wanted reread, they knew that question was presented to them, they analyzed that question, and they came out the way, at least from my analysis, they did. They found what was the adjusted contract price, and then they found that there was an expense of $600,000 over and above that.

Therefore, what was being presented to them was the issue of what O & Y agreed to pay. Whether anybody literally argued that $900,000 in overhead was included in that, I am not prepared to say. What I am sure of, subject to correction, is that it was never withdrawn from them as an issue. Again, I will stand corrected on that if you find me something in the record where Mr. O'Callaghan said: The $900,000 overhead claim is withdrawn from the jury in this action. I don't think there was ever such reservation. I would never have permitted it if there had been, I hope. You just don't try cases that way. There was the basic issue of what O & Y agreed to pay.

MR. SELTZER: The jury had to have a fixed target for question 3, which is what is the floor of the parties' agreement and then is there a damage above that.

THE COURT: That is the point I have been making. I agree with that, and that is the point I have been trying to make.

Let me just finish, and then I will hear you.

I am prepared to rule -- and this is the only way that is compatible with any sense of an orderly trial of that case -- that the parties had an opportunity to present all the evidence that they wished to present about every element that O & Y agreed to pay on buildings A and C. Nobody reserved the question of whether O & Y agreed to pay overhead, or reserved the question, which I will come to later, about whether O & Y agreed to pay some taxes. Nobody reserved that as being some special contractual agreement which was not to be included with what was presented to the jury, And I must say, if there had been a suggestion of that, it would have been something that would have been quite anomalous. We were having a hard-fought jury trial on these basic issues, and there would have been no sense in reserving some special part of the agreed price for some later determination for some unknown purpose. There would have been no purpose in it, and it would have been foolish. So, in my view, the parties tried the issue of what was the total agreement of O & Y as to what it would pay FEI on A and C.

The problem from O & Y's standpoint is that O & Y insisted that the amount of that agreement was what was in the 14.9 million contract price, and O & Y steadfastly insisted that that was all it agreed to. But the jury found that the amount was higher. Regardless of the precise components of what was argued about and what wasn't argued about, the issue was presented to the jury. Therefore, if FEI did not specifically mention the $900,000 as being part of that agreement, if they wanted to have that included they should have argued about it. They should have said that the adjusted contract price was 22 million plus 900,000. That was the time to do it. It is not the time to do it after the trial.

Let's suppose that somebody had said,, "Gee, overhead should be something included, $900,000 overhead, and that is over and above the formal contract price of 14-some million and this 7.8 million paid. It should be not just 22 million, it should be 22.9 million. Then the jury might well have found that there was no $600,000; that the agreed contract price swallowed up the whole. But that was the time to do it. So I am ruling that there is no separate issue on which FEI has a right to claim now in some separate proceeding.

I know Mr. O'Callaghan has some things to say, and I

don't want to prevent him, but I want to cover the tax reimbursement claim of a million dollars. Everything I have said about overhead applies to that. If there was to be some claim that O & Y agreed to reimburse taxes in the amount of a million dollars, and that was part of the ultimate agreed price paid by O & Y, the time to do it was at the trial. It seems to me that they had all the evidence and they had all the arguments -- when I say "they," the jury -- that anybody wanted to make, and the issue was before the jury: What did O & Y agree to pay? If somebody wanted to say, well, it wasn't just 22 million, it was 22 plus 900,000 or 22 plus $1,900,000, that is the time to argue it, not in some separate proceedings later.

I don't imagine Mr. Seltzer is going to object, but Mr. O'Callaghan may.

MR. O'CALLAGHAN: Thank you, your Honor. I am not going to take the time to cover this in this conference today. The trial, of course, was many years ago. My recollection is not verbatim. However, I do have a clear recollection that the trial was abbreviated, and FEI's claims were separated and segregated out by the Court for a later trial. My recollection is not just that the B and D portion of FEI's claims were severed, but that FEI's claims were severed.

THE COURT: What do you mean FEI's claims?

MR. O'CALLAGHAN: The trial, as I recall it, after two, perhaps three weeks, became focused solely, essentially, on the issue of stone and whether or not there was a failure and default in the performance of O & Y in stone supply and FEI's responsibility concerning that issue. That became a focal point for our case. To see the outcome of the jury's verdict, in retrospect, at whatever numbers the Judge was referring to, as all-inclusive of all of FEI's claims, whereas in reality the focal point of the case was the stone, I think is --

THE COURT: It doesn't really answer my point at all.

MR. O'CALLAGHAN: I am trying to answer your point. FEI, it is my recollection of the evidence and of the pleadings, did

not have its day in court about any of its claims. It was a defendant essentially on the issue of stone. I disagree with the Court's characterization of default.

THE COURT: Find me some reference to this. You see, it doesn't help to make certain general statements about day in court. You had plenty of day in court. We consumed a lot of time, and the parties chose what issues they wanted to present, they wanted to argue. But ultimately there were some questions that had to be answered.

Incidentally, you will see from the record and you will see reference in those two opinions that I issued -- September 19, 1988, and June 2, 1989 -- that I originally proposed a somewhat different format for the interrogatories to the jury. The parties asked to have something different than I proposed, and I went along with the parties. But these interrogatories presented some issues to the jury. What I have just said about the issue of the adjusted contract price was inescapable. Maybe we should have had more findings broken down instead of interrogatories, but nobody proposed it.

The point is that if the jury had been limited in its ability to deal with the adjusted contract price problem, if they had been limited to some formal definition, as, say, a particular writing which did recite the 14.1 million, and if they had not been able to use all the available evidence and deal with it in a general way, FEI would have been stuck for a liability of millions of dollars. This is why I have contended at some informal conferences that FEI came out of this extremely well, and you might recognize that.

The reason I am upholding that jury verdict is my belief that the jury was able to consider all the evidence, formal documents, oral commitments, and determine in an overall way everything that O & Y agreed to pay. If there had been some limitation on that -- and I am repeating myself, but this is extremely important -- if there had been a limitation in the definition of adjusted contract price, that limitation would have probably meant that your client was liable for about $8 million or more. But some things follow from that. One is that if they were able to look at all the evidence and look at the picture in what I will call a total way, then we have to, in all fairness, regard the jury verdict as involving an all-inclusive statement of what O & Y

agreed to pay.

If you want to start carving things out, what you are leading to is the possibility that you will get a new trial on everything, and you may get stuck ultimately with a multimillion-dollar verdict against FEI.

MR. O'CALLAGHAN: If I may explain, your Honor, I respectfully disagree with the premise that all was tried.

THE COURT: Show me in the record where you reserved the $900,000.

MR. O'CALLAGHAN: I have a recollection -- this is today, as we sit here, after many years -- that the jury, certainly counsel, but I recall as well the jury, was directed to limit the case essentially to the stone issue and only to the stone issue and to see the case through that perspective.

THE COURT: That has nothing to do with what the amount of the adjusted contract price is.

MR. O'CALLAGHAN: I think there was a further ruling precluding all evidence other than relating to the stone, which essentially diluted and vitiated any need or requirement or interest in FEI of presenting any further claims.

THE COURT: You are totally ignoring the component of question 3, which required a finding of adjusted contract price.

MR. SELTZER: That's right, and I remember summing up to the jury very explicitly on how I calculated adjusted contract price. There couldn't have been footnotes hanging out there that said this isn't the real adjusted contract price.

THE COURT: I don't remember and -- I will be very frank with you -- I have not gone over that trial record. It was up to you gentlemen to present what you needed to present, I have to say to you, Mr. O'Callaghan, I have gone to a great excess of work over these claims of yours, which have been consistently presented in a very vague, unsubstantiated manner. You should

have seen these issues. If you wanted to tell me that the $900,000 was carved out of that jury's consideration, show me the record reference. That is the issue. Any lawyer should know that. We had a jury trial. We had a determination. We had questions answered. What you are doing is saying that some particular points were reserved or carved out. Maybe they were. But after all this time, it is up to you, not to come in with a vague memory about the stone issue. I know about the stone issue, but you are not even addressing the issue. I think the time is past for submissions of this or that. It was up to you to present what was legally relevant to get this issue tried separately, and you haven't done it. I have waited and waited, and you have been asked to provide the specific groundwork of these claims. I have no basis, on the submissions that you have given me, to find that this was an issue reserved and carved out. And I don't believe it was.

I say the same thing about the claim for tax reimbursement, a million dollars.

MR. O'CALLAGHAN: I have the same objection.

THE COURT: You have the same objection. I make the same ruling.

Now I want to go on to the retentions. I discussed that in my opinion of September 19, 1988, at pages 14 and 15. Incidentally, no opinion seems to get out of my office without a mistake. On page 15 there is a reference once to a 1.6 million claim of retention, and then it is referred to as 1.5. I don't remember whether it was 1.6 or 1.5. I will just assume it is 1.6 anyway. We know what we are talking about.

I said, and I am referring to buildings A and C obviously, "Even if O & Y retained the 1.6 million at some point, O & Y has more than made up this deficiency by the $7.8 million payments it made to and on behalf of FEI, beginning in the fall of 1984" -- which have been described previously. So I believe that that ruling of mine is sound, I stick by it. That covers the claim for retention in the amount of $735,213 for A and C.

Now we come to the $323,937 for B and D, and Winter Garden.

MR. O'CALLAGHAN: Your Honor, if I might place

something in the record about the A and C position. It has always been my argument at least that any additional funds that Olympia & York advanced they did so for their own account, to their benefit, and they withheld the retention and withheld it and sued at that time.

THE COURT: All right. When we get to B and D and Winter Garden, we are departing from the jury's verdict.

MR. O'CALLAGHAN: Your Honor --

THE COURT: So I think that the reasoning that I have used about the previous items cannot apply to the $323,937 claimed retention for B and D and the Winter Garden.

There is the claim of unpaid work on building B of $400,000. Again, that is certainly not covered by the verdict.

MR. O'CALLAGHAN: Your Honor, if I may add a point to that. The analysis that you are looking at was done in preparation for a meeting that the principals had of FEI and O & Y and was not completed, up-to-date, until I did some preparation prior to August of this year, and the actual number, as I calculate this, is closer to 475,000 on the B tower claim. On building D, there is a claim for close to $800,000, which you don't have on the list, most of which --

THE COURT: What is that about?

MR. O'CALLAGHAN: -- most of which, it is my recollection as I sit here today, are in the pleading, in the amended third-party complaint, I have little handwritten notes to myself, in preparation for the trial which we anticipated in August: "Production overruns, unfilled containers, some shipping disruption, and extra handling." And this was documented in claim submissions by FEI to O & Y, but in preparation for the settlement discussions was not at that time raised. But it certainly was available for trial.

THE COURT: When did you present that to me?

MR. SELTZER: It has never been presented in this court.

THE COURT: You were supposed to come in with your final submission and document it and support it. I don't have anything about that. It is always possible that something slips up in my office, it has before and it will again, so I don't want to penalize anybody for something that goes wrong in my office. But we were not at the pleading stage. We were at the point of submitting matters which Mr. O'Callaghan was supposed to document and support, and that was what I was supposed to deal with. Have we got any $800,000 --

MR. SELTZER: That's right, and we got, in 1988, this affidavit or affirmation from Mr. O'Callaghan and this affidavit from Mr. Fogarty. If those numbers are numbers he is coming up with this summer in 1992, that is four years later.

MR. O'CALLAGHAN: The numbers were in the pleadings.

MR. SELTZER: But this was submitted to the Court when the Court said, where is your detail, where is the support? And if it wasn't submitted in these pages in 1988 when the Court was asking for it, I don't think it is appropriate to keep rummaging through papers and coming up with new numbers today.

THE COURT: We had a hearing on the record on October 5, 1988.

MR. SELTZER: That's right, that is when you had asked --

THE COURT: And I made some requests. Then I got an affidavit of Mr. Fogarty, which I have analyzed as thoroughly as I possibly can, and had exhibits, and it was notarized on the 30th of November, 1988. Then I got -- I guess this is dated before that -- I got something from Kaye, Scholer dated --

MR. SELTZER: November 16.

THE COURT: -- November 16, 1988. And then I got an affirmation of Mr. O'Callaghan, November 4, 1988. That is it.

The thing has been sitting here for a little over four years, for a lot of reasons. One is, I was hoping that there would be a settlement. I was hoping and I thought that there was some discussion. Then I finally put it down for trial, and then we had a conference, and your colleague came in and reminded me that I had some homework to do. So this is where we stand. A lot of time has gone by. But the time does not create the opportunity for further amendment to those submissions. I am going to take those submissions of the fall of 1988 as fixing the claims, because there has been a lot of work done in my office, by my staff and by me, to try to take what I think have been rather difficult issues and determine what to do with them.

So my list is the list which I regard as the claims, and I have dealt with them. The two matters which I don't think were covered by the verdict are the retention claim of $323,937 relating to B and D and the Winter Garden, and the unpaid work on B, the claim for the unpaid work on B, $400,000. The $400,000 was a rounding. I think that Mr. O'Callaghan at times did the rounding himself. But if it is 400 plus, I am not going to worry about that. I am going to use the 400 for my calculations now, with the recognition that it is a rounding.

The total amount, not covered by the verdict, is $723,937. The verdict against FEI is $600,000. The unpaid loan owed by FEI to O & Y is $456,251. The total of those amounts is $1,056,251. We have mutual accounts. We have an amount owing from FEI to O & Y of $1,056,251. We have claims by FEI against O & Y, which I have held are not covered by the verdict, of $723,937.

If we should assume that FEI wins every penny of the $723,937, this would still leave a balance in O & Y's favor of $332,314.

I am not talking about interest, and let's not try to get into that.

Where do we go from there? Because it seems to me that we have a lot narrower issues in terms of money at this moment than maybe appeared, at least to FEI, before I entered into this discussion.

Obviously, FEI has the right to object, and FEI has stated

its objections on the record, but that is where this Court is. I would like to know where we go.

MR. O'CALLAGHAN: If I might respond, your Honor, on the building B claims, there is certainly my recollection of the pleadings -- I don't have a firm recollection today of the submission of October 5, '88 -- but certainly $800,000 of claims cannot --

THE COURT: Mr. O'Callaghan, right or wrong, I am fixing the claims of what you submitted to me in November and that's it.

MR. O'CALLAGHAN: I am not saying submitting. I have a recollection that --

THE COURT: I am saying that I am going by the submissions of the fall of 1988 as being what were submitted to me as the claims still to be dealt with. If I have misread the submissions of the fall of 1988, that is something else again, but I don't think I have. And the whole purpose of the exercise at that time was to define the remaining claims. I will treat it that way. What you claimed at that time is what remember. What remained and everything else was abandoned as far as I am concerned.

What I have done here today is to deal with what was submitted to me, according to my analysis, following the October 5, 1988 hearing, and I hope I have analyzed things correctly. If $800,000 was presented in those materials and somehow I have ignored it, I will be glad to have my attention called to that mistake. But I am not going to go back to prior materials.

We did have a trial, and I know that to some extent I asked to have certain things reserved, but out of desperation to get the trial over with, which deserved to get over with.

I wish there can be a little realism on the part of FEI -- and I return to something I have said many times -- and that is that it was within the jury's province to send you out of that trial with a verdict against FEI of many millions of dollars, 10 million, 12 million, or more. They took a view of the evidence which I am not sure even you argued very much, because, as you have said just now, you were concentrating on the stone issue.

MR. O'CALLAGHAN: I said that the Court directed --

THE COURT: You thought that if you could beat O & Y on the stone issue and show that they were at fault, you could beat the case. It turned out that wasn't the only issue, and you did an extremely good job at that trial, I am not saying you didn't, but the point is the jury took the issues and fashioned them in a way that I believe was entirely fair but it really made more of some of your arguments than you almost made. If somehow you and your client could gain some small recognition of how extremely well you emerged from that trial, it might make settlement of this matter possible.

I will not have any trial, except possibly on the matter of the retention for B, D, and Winter Garden, and unpaid work on B. I will say it on the record: I think it is a shame to consume the time of the Court and the time of O & Y and have all this litigation expense on that. I think the action should be over with. But I don't see my way to ruling as a matter of law on a summary judgment in throwing out these remaining claims which I have talked about.

What do you say? Do you have any other words of wisdom about what I have said was not covered by the verdict?

MR. SELTZER: I think there was a strong argument that O & Y had a right to terminate FEI's services on B and D contracts and that our right to terminate was vindicated by the jury's finding that FEI had defaulted in its performance on A and C. For the same reasons that they were in default on A and C, we could not have been required in law to continue using a defaulting contractor to proceed with two more buildings. FEI's financial incapacity to perform the first two contracts disabled it from performing B and D.

THE COURT: I know that argument and maybe I haven't grasped it fully. FEI did some work on B and D, right?

MR. SELTZER: Yes.

THE COURT: And O & Y terminated them, right?

MR. SELTZER: Terminated for cause.

THE COURT: I think you are right on the legitimacy of terminating them. What I am not clear on is who owes whom what after the termination? Maybe I have not given full effect to your rights on that, because I think you had a right to terminate, and I would say that it would be ridiculous to have another trial to see if there was a default because of a financial problem. You were in court, O & Y was in court, FEI was in court, and I think the jury's finding of default -- that was the answer to my question -- is the finding that controls. But my question is, who owes what after that?

MR. SELTZER: In responding to that, the Court has told us that there can't be a quantum meruit claim where the parties entered into a transaction based on a written contract. You have even reminded us of the law in New York, which is quite strong in saying that. Therefore, if FEI is in material breach of the B and D contracts, their material breach is going to cut off their right to enforce future obligations to pay under the written contract. If they don't have a right to further compensation under the written contract because of their prior material breach, they are not going to be able to then turn to quantum meruit and say, well, O & Y was enriched by the value of our services.

THE COURT: According to the contract, what was their right? There was no right to be compensated for what they had done?

MR. SELTZER: For the value of goods that were turned over to us. If they had left materials on the site which we then inherited and gave to another contractor, they would be entitled to get credit for that. But their claim is that they turned over stones that we then used with someone else.

THE COURT: The claim is for work, it is for labor, basically.

MR. SELTZER: And the labor was defectively performed, and bringing somebody else in cost us much more than

the B and D contract with FEI.

THE COURT: Let's suppose that their claim to $400,000 is not for stone supply, it's for their own labor, their materials, their tools, and so forth. Let's suppose they had a claim up to that point to which, if they had continued, they would recover. I am frankly a little hazy on this, but my point is, let's suppose just hypothetically they would have a contractual right to get paid $400,000 to that point if all had gone well. Now, all didn't go well. They were financially in trouble and defaulted because of that reason, and they were terminated. But under my hypothetical, which is a little bit artificial, did they have no contractual right to get paid?

MR. SELTZER: I think they were paid whatever they were due under the contract up to the point of termination, and the reason we terminated was to cut off all further contract rights. That is why Mr. O'Callaghan has characterized his claim for unpaid work as a quantum meruit claim in the papers that he submitted in the fall of '88. He then tried to augment that amount by adding a retention, which your Honor summarized also as the $323,000. That is a different category altogether. Retention isn't for --

THE COURT: What is your $400,000 claim?

MR. O'CALLAGHAN: Your Honor, my recollection is, they weren't paid anything for their work.

THE COURT: On B?

MR. O'CALLAGHAN: On building B tower. That is what the claim is: that they did engineering design, drafting, the stone analysis, and the layout, up to the 26th floor.

THE COURT: Could we do this. It is 6 o'clock. I don't want to go over anything on which I have ruled, but I would appreciate your taking a little more time and analyzing the two items I am talking about, because I don't want to roll into a trial if it is unnecessary. I am simply not certain, and maybe I should

be, that your papers are all that clear about this. I do not want additional papers. If Mr. O'Callaghan's presentation is too vague to make a claim, it is too vague to make a claim. But I would like another brief session if you could come down, and we could simply take these remaining issues and decide do we have to have a trial or don't we. I was impressed with the O & Y's contractual claims but I wasn't certain of it. In other words, your point is, there was a breach of contract, and you under the contract owed no more money on B, D, or the Winter Garden. I just couldn't quite come to that point on what was presented to me, but maybe I am just missing something.

MR. SELTZER: I will have to see if he is making a claim for more than quantum meruit. I understood that the claim for unpaid work was quantum meruit, and if that is what it is, maybe the Court has already spoken to that.

THE COURT: I am not interested in quantum meruit. I am talking about whether there is any right under the contract. Maybe it is my fault but I am just not clear about that.

MR. SELTZER: I will check what we submitted in November and see if there is a claim going beyond quantum meruit, a claim to enforce the contract to pay him the 400, 000.

THE COURT: I think it is worth it to do that, because if we fall into another trial on this and end up realizing that there wasn't any need for that trial if we had just analyzed the contract and the facts better, then why go through that? I think it is worth that extra step. Everything else that I have said I am regarding as final.

MR. SELTZER: The second point, which I said I thought was probably the more important point, is that it would be instructive to me and to O & Y to find out something about the financial condition of the FEI entity, which is a party to this case. Our interest in pursuing this further is going to be enhanced or limited by FEI's ability to pay. We will want what the financial condition of the company is. We don't have a bonding company anymore.

THE COURT: What you are saying is that if my rulings stand, O & Y is the party that is owed money.

MR. SELTZER: Right.

THE COURT: Even if they get all the 700-odd thousand. I think you have to pursue that with Mr. O'Callaghan. Maybe you will get cooperation, maybe you won't, I don't know. What do you suggest? Do you want any relief from me?

MR. SELTZER: I wanted your support for our getting limited discovery. By "limited," I mean I am not going to ask for volumes; I would like to see financial statements that have been prepared by accountants or financial statements that have been submitted to banks or which have been submitted to other builders to support FEI's applications for loans or FEI's applications to get contracts for new work, so we can see what they are telling the world is their net worth.

THE COURT: What about that?

MR. O'CALLAGHAN: I don't think it is appropriate at this time, your Honor. I think Olympia & York is the party that we should be concerned about.

Secondly --

THE COURT: When all is said and done, while I think it is just great to be a real tough lawyer, there are times that you are not going to serve your client very well. The party who came out of that trial really badly was O & Y. You came up swimmingly. Let's just talk about the possibility of an appeal after a final judgment. You can't do anything on appeal, nothing. I think that if anybody has any real grounds for appeal, anything to talk about, it is O & Y. And I don't think O & Y would win. I think that things were submitted fairly and decided fairly. But FEI has nothing, in my view, to say on appeal.

The rulings I am making right now are rulings by the Court, and maybe you can go up and say that the Court erred in the rulings I have made. And they involve a substantial amount of money. What I feel about your appeal doesn't make any

difference. But what I would like to say is that I think you ought to be realistic and realize that what I have said here, unless you have something really very clear in the record that carves certain things out of the trial, you haven't got anything you can say on appeal. So what has happened is that you have come out of a jury trial with a verdict which is so small that you should be saying prayers of thanks, and you have these tag-in things that you are trying to bring up. They are really not worth very much. Your client somehow is going to end up owing O & Y six figures, and if there was ever a reversal on appeal, maybe seven figures.

So if your client could cooperate with O & Y in arriving at some basis for settlement, and if the fact is that your client is in financial difficulty, that is what Mr. Seltzer is willing to talk about with you.

MR. O'CALLAGHAN: Your Honor, I did not say I --

THE COURT: He is willing to talk about it.

MR. O'CALLAGHAN: I did not say --

THE COURT: He didn't have to talk about it. He could sit there and say we are going to go after him, we don't care. But he is sensible in saying maybe our judgment for $700,000 is not going to be worth all this, and O & Y is not in the greatest condition and we don't want to spend their money foolishly. You should not be saying, we won't go into that at this point.

MR. O'CALLAGHAN: I did not say that at this point.

THE COURT: You should be jumping --

MR. O'CALLAGHAN: It was the formality.

THE COURT: Yes, you did say it.

MR. O'CALLAGHAN: It was the formality of discovery. He talked about taking depositions. That is the impression I had, and that is what I objected to. If he would like to have a discussion with me or the principals, that is something else.

THE COURT: All I want is facts, and the way you get facts is to have some honest, sensible, economic way of getting facts, and you should help him get them.

If FEI has enormous assets and is capable of paying a judgment of $500,000 or $8 million, then that would be, of course, something that O & Y would want to consider in determining whether they would want to pursue their judgment or even go to the Court of Appeals and try to get a reversal so that they could claim eight, ten, or twelve or more millions from FEI. If FEI couldn't satisfy a judgment like that, maybe they won't feel it is worth it.

We have done all we can. If you could, both of you, be in touch with me when you are ready for a little further discussion, I think it is worth it. Thanks a lot.

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 15, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 15th day of September, one thousand nine hundred and ninety-four.

Present:

Honorable Ralph K. Winter,
Honorable Joseph M. McLaughlin,
Circuit Judges.[22]

OLYMPIA & YORK BATTERY PARK COMPANY, also known as WFC Tower A Company; O & Y (U.S.) DEVELOPMENT CORP., as successor to O & Y Tower C Corp.; OLYMPIA & YORK TOWER B COMPANY; OLYMPIA & YORK TOWER D COMPANY,

Plaintiffs-Appellees,

v.

INSURANCE COMPANY OF NORTH AMERICA, PHILADELPHIA,

Defendant-Third-Party-Plaintiff,

v.

FEI LTD.; JOHN J. FOGARTY; JEAN FOGARTY,

Third-Party-Defendants-Appellants.

---

[22]Judge Timbers recused himself from the panel after oral argument. Pursuant to this court's Rule § 0.14, the appeal has been heard and decided by the remaining two judges of the panel.

ORDER
93-7547

SEAL: UNITED STATES COURT OF APPEALS
FILED
SEP 15 1994
GEORGE LANGE III, CLERK
SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New york.

This cause came on to be heard on the transcript of record and was argued.

ON CONSIDERATION WHREREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Third-party-defendants-appellants FEI Ltd., John J. Fogarty, and Jean Fogarty appeal from Chief Judge Griesa's dismissal of their third party claims against Olympia & York Battery Park Company, et al., which is embodied in a December 23, 1992 conference direction and a May 4, 1993 dismissal order and Fed. R. Civ. P. 54(b) certification. We affirm for substantially the reasons stated in the district court's conference direction of December 23, 1992. *Olympia & York v. Insurance Co. of North America*, No. 85 Civ. 1238 (S.D.N.Y. Dec. 23, 1992).

S/Signature
Hon. Ralph K. Winter, U.S.C.J.

S/Signature (per RKW)
Hon. Joseph M. McLaughlin, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

ISSUED AS MANDATE 10-6-94 **[Erroneously]**

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING IN BANC DATED NOVEMBER 15, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK BATTERY PARK

v.

INSURANCE CO OF NA

SEAL:
UNITED STATES COURT OF APPEALS
FILED
NOV 15 1994
GEORGE LANGE III, CLERK
SECOND CIRCUIT

DOCKET NO: 93-7547

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by Appellant's FEI LTD., JOHN FOGARTY, and JEAN FOGARTY.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is *DENIED*.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANG III, Clerk
By: S/Signature
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX D - RULE 54(b) JUDGMENT AND ORDER OF CONDITIONAL DISMISSAL DATED MAY 4, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,

Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,

Defendant,

FEI LTD., et al.,

Third-Party Defendants.

85 Civ. 1238 (TPG)

RECEIVED IN CHAMBERS
OF CHIEF JUDGE
THOMAS P. GRIESA

RULE 54 (b) JUDGMENT
AND ORDER OF
CONDITIONAL DISMISSAL

MAY 4, 1993

SEAL:
U.S. DISTRICT COURT
FILED
MAY 5, 1993
S.D. OF N.Y.

UPON plaintiffs' motion for entry of Rule 54 (b) judgment on certain claims and conditional dismissal of all remaining claims, and all the pleadings and proceedings had herein, and upon full consideration;

WHEREAS the Court has found that certain claims of third-party defendants are final and severable and no just cause

exists to delay entry of judgment with respect to them (*see* Rule 54(b) Certification of even date); and

WHEREAS the Court has determined that further litigation of all remaining claims would be futile; it is hereby

ORDERED AND ADJUDGED, pursuant to Fed. R. Civ. P. 54(b), judgment that third-party defendants take nothing shall be entered on their $900,000 claim for overhead and their $1,000,000 tax reimbursement claim, in connection with buildings A and C, because such claims were incorporated in the jury verdict in this action and are therefore not further actionable. Such judgment is final and appealable.

IT IS FURTHER ORDERED that plaintiffs' claims for $600,000 upon the jury's verdict and for approximately $450,000 in connection with a loan to third-party defendants are, upon plaintiffs; consent, hereby dismissed with prejudice, subject to reinstatement if the foregoing judgment is reversed or the claims to which it pertains are remanded as a result of any appeal.

IT IS FURTHER ORDERED that all other remaining claims of third-party defendants are hereby dismissed with prejudice, subject to reinstatement if the foregoing judgment is reversed or the claims to which it pertains are remanded as a result of any appeal.

Dated: May 4, 1993

S/ Thomas P. Griesa
THOMAS P. GRIESA, U.S.D.J.

APPENDIX E - RULE 54(b) CERTIFICATION, DATED MAY 4, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,
Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

-against-

FEI LTD., et al.,
Third-Party Defendants.

85 Civ. 1238 (TPG)

RULE 54(b) CERTIFICATION

UPON all the pleadings and proceedings had herein and upon full consideration, the Court finds the following facts in support of its entry of judgment, pursuant to Fed. R. Civ. P. 54(b), on certain of third-party defendants' claims.

1. The majority of the claims in this action were tried to a jury in March 1988.

2. The Court ruled on December 23, 1992 that the third-party defendants' claims for overhead ($900,000) and tax reimbursement ($1,000,000) were considered by the jury and incorporated into its verdict and are thus not further actionable.

3. The Court's ruling is final.

4. Such claims are severable from any and all other outstanding claims in this action.

5. There is no just cause, pursuant to Rule 54(b), to delay entry of judgment on such claims.

Dated: 5-4-93

S/_____
THOMAS P. GRIESA, U.S.D.J.

APPENDIX F - MARCH, 1988, TRIAL
FEI EXHIBIT 317,
"RECAP OF PAYMENTS,"
ANNEXED TO NOVEMBER, 1985,
FEI THIRD-PARTY COMPLAINT,
IN EVIDENCE AT MARCH, 1988, TRIAL
(F. GUILFOYLE AND
J. FOGARTY TESTIMONY,
***See App P*, MARCH, 1988,**
TRIAL TRANSCRIPT, at 63a,
and *Apps R* at 76a and *S* at 110a)

FEI LTD
Hastings-on Hudson, NY., U.S.A.
Athy - Ireland

RECAP OF PAYMENTS FROM O&Y TO FEI
RE BLDGS. A & C as of

	"C"	"A"	
CONTRACT	5,608,813.00	5,060,842.00	10,669,655.00
EXTRAS: OTHER	2,097,390.44	1,722,686.26	3,820,076.70
EXTRAS: MARBLE	1,004,238.82	691,751.83	1,695,990.65
DEDUCTS: OTHER	(292,577.19)	(141,696.65)	(434,273.84)
DEDUCTS: MARBLE	(240,601.00)	(580,168.00)	(820,769.00)
ADJUSTED CONTRACT	8,177,264.07	6,753,415.44	14,930,679.51

BILLED FOR:			
CONTRACT	5,484,736.85	4,952,180.92	10,436,917.77
EXTRAS: OTHER	1,825,376.94	1,565,794.38	3,391,171.32
EXTRAS: MARBLE	1,004,238.82	691,751.83	1,695,990.65
DEDUCTS: OTHER	(292,577.19)	(141,696.65)	(434,273.84)
DEDUCTS: MARBLE	(240,601.00)	(580,168.00)	(820,769.00)
TOTAL BILLED PER REQUISITIONS:	7,781,174.42	6,487,862.48	14,269,036.90

PAYMENTS PER REQUISITIONS:	12,529,383.59	
" ON ACCT. TO FEI:	6,191,116.39	
" " " OTHERS:	201,105.60	FEI BILLS
" " " OTHERS:	115,910.20	O&Y BILLS FOR FEI ACCT.
TOTAL PAYMENT TOWARD FEI'S "A/C" ACCOUNT	19,037,515.78	

BILLING/CLAIMS SUBMITTED:		
REQUISITIONS: "A"	6,487,862.48	
"C"	7,781,174.42	
CLAIMS:		
4-15 MARBLE	438,929.33	
7-22 PRIORITY CHANGE	1,441,687.00	
8-05 EXCESS WAGE	4,068,168.00	
10-23 STONE REPAIRS	898,073.25	
TOTAL BILLING/CLAIMS		21,115,894.48
LESS PAYMENTS		(19,037,515.78)
STILL DUE FEI		$2,078,378.70

APPENDIX G - MARCH, 1988, TRIAL
FEI EXHIBIT 318 FOR IDENTIFICATION
[COVER PAGE 318A "IN EVIDENCE",
ANNEXED DOCUMENTATION, (40 PAGES),
***NOT* IN EVIDENCE]**

FEI LTD.
Athy Industrial Park
Athy, Ireland

5th July, 1985

Olympia and York Battery Park Company,
245 Park Avenue, 25th Floor,
New York, 10167

AMOUNTS OWING TO FEI LIMITED AT 30/06/1985

Total amounts due per attached documentation	9,551,599.70
Cash already advanced in recognition of cost overruns	(5,327,338.25)
TOTAL NOW DUE	4,224,261.45

S/D. O'Reilly
D. O'Reilly
Financial Controller

DX 318A ~~ID~~
(JUST COVER PAGE)

APPENDIX H - MARCH, 1988 TRIAL
O&Y EXHIBIT 15, IN EVIDENCE
"O&Y LOSSES"

	BLDG A	BLDG C	TOTAL
O&Y COST FOR WORK IN F.E.I. CONTRACTS:			
AMOUNT PAID TO FEI PER CONTRACT	$5,626,258	$6,894,262	$12,520,520
AMOUNT PAID TO FEI ABOVE CONTRACT	3,055,825	3,888,105	6,943,930
AMOUNTS PAID OR DUE TO OTHERS	3,630,381	3,460,050	7,090,431
UNREPAID LOAN TO FEI	--	--	473,250
TOTAL PAID BY O&Y	$12,312,464	$14,242,417	$27,028,131
ADJUSTED CONTRACT PRICE	-6,097,532	-8,012,213	-14,109,745
O&Y LOSSES	**$6,214,932**	**$6,230,204**	**$12,918,386**

APPENDIX I - MARCH 1988 TRIAL INTERROGATORIES FOR JURY

OLYMPIA & YORK v. INA v. FEI

Interrogatories for Jury

1. Do you find by a preponderance of the evidence that FEI became financially unable to proceed with the contract?

Yes X

No _____

2. O & Y contends that it substantially performed its obligations with respect to granite supply and that accordingly there was no failure of performance by O & Y causing FEI's financial inability. FEI contends that O & Y failed to substantially perform its obligations with respect to granite supply and that such failure of performance by O & Y caused FEI's financial inability. O & Y has the burden of proof to sustain its contentions by a preponderance of the evidence.

a) Do you find by a preponderance of the evidence that O & Y substantially performed its obligations with respect to granite supply?

Yes _____

No X

b) If your answer to part (a) is No, do you find that O & Y has shown by a preponderance of the evidence that this failure did not cause FEI's financial inability?

Yes X

No _____

If your answer to Question 1 is Yes, and if your answer to

either Question 2(a) or Question 2(b) is Yes, proceed to Question 3. Otherwise proceed to Question 4.

3. What is the amount of expenses above the adjusted contract price, if any, that you find by a preponderance of the evidence O & Y reasonably incurred to complete or repair FEI's work under the contract?

$ 600,000

4. Do you find by a preponderance of the evidence that the change in priority constituted a material alteration of the contract?

Yes _____

No _____

APPENDIX J - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 19, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK,
Plaintiff,

-against-

INSURANCE COMPANY OF NORTH AMERICA,
Defendant,

-against-

F.E.I., INC.,
Third-Party Defendant.

85 Civ. 1238 (TPG)

OPINION

Since the conclusion of the trial in this action on March 30, 1988 various motions have been made. A hearing on the motions was held on June 17, 1988, at which time certain rulings were made, to be followed by an opinion.

I.

O & Y has moved for judgment notwithstanding the verdict, or in the alternative, for a new trial, with respect to the jury's answer to Interrogatory 3. The court denied this motion on June 17, 1988. The following constitutes a further explanation of what was stated at that time. The interrogatory and the answer are as follows:

3. What is the amount of expenses above the adjusted contract price, if any, that you find by a preponderance of the evidence O & Y reasonably incurred to complete or repair FEI's work under the contract?

$600,000

According to O & Y, the undisputed evidence at trial revealed that the adjusted contract price was $14,109,745 and that O & Y incurred reasonable expenses above this figure in the amount of $12,918,386 - the total payments by O & Y being $27,028,131.

O & Y argues that the $12.9 million excess can be divided into two categories - amounts paid before FEI was terminated in April 1986 and amounts paid post-termination. O & Y contends that the evidence is unrebutted that it incurred expenses totalling $7,812,407 above the adjusted contract price prior to termination, total pre-termination payments being about $22 million. According to O & Y, the $7,812,407 consisted of $6,943,930 paid directly to FEI, $517,574.21 paid to FEI's suppliers, and $350,903 for workmen's compensation premium payments for FEI.

With regard to post-termination expenses, O & Y argues that the evidence shows that these amounted to $4,632,729.

In addition to the above items, O & Y contends that it is undisputed that FEI owes an additional $473,250, representing the unpaid balance on a loan.

O & Y contends that there was no basis upon which the jury could fail to include the $7,812,407 pre-termination expenses in the amount found in answer to Interrogatory 3. O & Y further contends that the $473,250 loan balance should have been included. O & Y seeks judgment n.o.v. for $7,812,407 against INA and $473,250 against FEI. With regard to the $600,000 found by the jury, O & Y apparently recognizes the obvious fact that this amount was awarded with respect to the post-termination expenses. In other words, it is clear that the jury awarded nothing for the pre-termination expenses, and did not make an award with respect to the loan.

As to the post-termination expenses, O & Y recognizes that there was a legitimate question for the jury as to the amount of the

reasonable expenses incurred and is not seeking judgment n.o.v. with respect to this issue. However, O & Y contends that the jury's verdict was against the weight of the evidence and that a new trial should be held on this issue. Moreover, O & Y contends that if judgment n.o.v. is not granted with respect to the pre-termination expenses and the loan, a new trial should be held on the entire issue of damages.

In dealing with a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the party supporting the verdict. The motion will be granted only if there is a complete absence of prohibitive evidence to support the verdict or the evidence is so strongly and overwhelmingly in favor of the moving party that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him. *Noonan v. Midland Capital Corp.*, 453 F.2d 459, 461 (2d Cir. 1972). If there is a view of the case which reasonable jurors could take and which supports the verdict, a judgment n.o.v. will not be granted. *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108, 119 (1963).

The standard for granting a new trial is somewhat less demanding. A new trial can be granted where the judge determines that the verdict is contrary to the weight of the evidence. However, the judge must abstain from interferring [sic] with the verdict unless it is clear that the jury has reached a seriously erroneous result. *Bevevino v. M. S. Saydiari*, 574 F.2d 676, 684 (2d Cir. 1978).

For purposes of this motion, the court will assume that O & Y made payments to FEI, and to third parties on behalf of FEI, totalling about $27 million. However, in order to answer Interrogatory 3 the jury needed to find what portion of these expenses were *reasonably incurred*, and also needed to find the amount by which the reasonably incurred expenses exceeded the *adjusted contract price*.

The issue on this motion breaks down into two questions:

(1) Was the jury bound to accept the figure of $14,109,745 as the adjusted contract price?

(2) Was the jury bound to accept the proposition that the full $27 million spent by O & Y was *reasonable*?

In the view of the court, both questions must be answered in the negative.

By the fall of 1984 the contract price, with adjustments agreed upon at that time, was $14,109,745. The amount which had been paid to FEI at this time was $12 million. The balance had been retained by O & Y as is customary in construction projects.

Numerous problems had been experienced by the parties dating back almost to the inception of the project, but the fall of 1984 presented an acute crisis. According to the testimony of Jack Fogarty, Sr., which the jury was entitled to accept, O & Y was making extreme demands on FEI in order to make the progress which O & Y desired. In order to comply with these demands, FEI's level of expenses was increasing due to a greatly expanded work force, additional equipment, etc. In connection with these problems, Fogarty had discussions with a representative of O & Y by the name of Otto Blau. Fogarty's testimony regarding his discussions with Blau was essentially uncontradicted since Blau was not called as a witness by O & Y, although he attended parts of the trial.

According to Fogarty's testimony, Fogarty indicated to Blau in the fall of 1984 that FEI could not afford to continue the work at the level of expense required to meet O & Y's demands, and in discussions at this time and thereafter, Blau sought to have FEI continue, repeatedly assuring Fogarty, "You won't be hurt." According to Fogarty, in order to have FEI stay on the job, O & Y agreed to make substantial payments to FEI, and also to make payments to FEI's suppliers on behalf of FEI, over and above the $12 million already paid to FEI and over and above the then existing $14.1 million adjusted contract price. As already indicated, by the time FEI was terminated in April 1986 the total amount of all payments to and on behalf of FEI was about $22 million, or about $7.8 million more than the $14.1 million figure.

FEI and INA argue that the jury found, and found properly, that the $7.8 million involved a further adjustment to the contract price, making the total adjusted contract price $22 million.

O & Y contends, on the other hand, that the jury was not justified in using any figure for the adjusted contract price except the $14.1 million. O & Y argues that what occurred in the fall of 1984 was that FEI defaulted because it was financially unable to

complete its work for the adjusted contract price of $14.1 million, and that the payments to and on behalf of FEI thereafter prior to the termination of FEI - $7.8 million - should not be considered as made pursuant to any agreement with FEI involving further adjustments to the contract price. O & Y notified INA in the fall of 1984 of what it claimed was a default by FEI. O & Y argues that INA is liable on its bonds for all payments made to and on behalf of FEI thereafter.

It should be added that any liability of INA would be passed on to FEI under an indemnity agreement. Also, although O & Y originally sued INA only, the pleadings now contain a direct claim by O & Y against FEI.

It is now appropriate to consider the meaning of the jury's several interrogatory answers with respect to the positions of the parties. It should be noted that the court originally proposed a different format for jury interrogatories than what was ultimately used. The court would have basically asked the jury to find whether FEI defaulted, whether the default caused O & Y loss, and if so, how much. All parties objected to this approach, and proposed more particularized interrogatories. In retrospect, the latter format may have been less than ideal. However, it was in accordance with the wishes of the parties, and it is now clear that the jury used these interrogatories to reach a just result.

The first interrogatory asked whether the jury found that "FEI became financially unable to proceed with the contract." The jury answered in the affirmative. It was understood that FEI's financial inability to proceed amounted to a default under the contract, unless that financial inability was caused by FEI [sic]. In connection with this causation point, only one issue was presented to the jury, and that was whether O & Y failed in its obligations as granite supplier and whether this circumstance caused FEI's financial inability. The jury found, in answer to Interrogatory 2, that O & Y did not substantially perform its obligations as to the granite supply, but that this failure did not cause FEI's financial inability. Because of the burden of proof rules adopted by the court, the actual questions to the jury were of a slightly different tenor, but this is the essence of the what the jury found.

The net affect [sic] of the jury's answers to Interrogatories 1 and 2 was that FEI had defaulted on its contractural [sic]

obligations. It had become financially unable to proceed with the contract, and this financial inability was not excused - at least it was not excused by O & Y's failure with respect to the granite supply. It is important to note that the jury was not asked to specify the time when FEI became financially unable. None of the parties suggested such a question.

This brings us to Interrogatory 3, which asked the jury to find the amount of expenses above the adjusted contract price which O & Y reasonably incurred to complete or repair FEI's work under the contract. The jury answered that this amount was $600,000.

It is quite easy to discern how the jury arrived at this figure of $600,000. They clearly accepted the testimony of Fogarty, as described above, to the effect that commencing at least in the fall of 1984, FEI was incurring expenses of great and unforeseen magnitude, that FEI made it plain to O & Y that FEI could not afford such expenses, that O & Y caused FEI to continue the work and to do so at the high expense level by providing large additional payments to FEI and to third parties on behalf of FEI.

What the jury undoubtedly found was that the entire amount of payments by O & Y between the fall of 1984 and the April 1986 termination - about $7.8 million - were payments which O & Y agreed to make to FEI, and that they constituted part of the "adjusted contract price" referred to in Interrogatory 3. Thus, it is clear that the jury found that the adjusted contract price was not $14.1 million, but $14.1 million plus about $7.8 million, or about $22 million.

By the same token, the jury clearly rejected O & Y's argument that the adjusted contract price was no more than the $14.1 million, which had been agreed upon as of the fall of 1984. The jury undoubtedly rejected the idea (which is inevitably involved in O & Y's position) that FEI continued to work for about a year and a half following the fall of 1984 and received $7.8 million in payments subject to having to refund them. The jury clearly concluded that this concept would be at sharp odds with Blau's assurances that FEI would not be hurt. The jury was advised in plain terms that, although the main claim of O & Y was against INA on the performance bonds, any recovery against INA would be indemnified by FEI. Thus the jury knew that the ultimate burden would fall on FEI, whether through INA's third-

party claim against FEI or through O & Y's direct claim, pleaded following the filing of the original complaint.

The decision reached by the jury was in accord with the weight of the evidence. The jury was fully justified in concluding that the adjusted contract price included the $7.8 million paid to and on behalf of FEI between the fall of 1984 and the termination in April 1986.

This brings us to a consideration of that termination and what occurred thereafter. It was O & Y who terminated FEI. However, O & Y contended that the April 1986 termination was part of a chain of events resulting from the financial inability of FEI to complete its contract. The jury could properly find that O & Y agreed to support FEI financially for a time, but was not obliged to do so indefinitely, and was warranted in terminating FEI when it did in April 1986. What remained was to determine what expenses O & Y reasonably incurred to finish FEI's work following this termination.

O & Y claims that it spent approximately $4.6 million after the termination of FEI to complete work which should have been done by FEI. However, the jury determined, in answering Interrogatory 3, that the expenses *reasonably incurred* were $600,000. O & Y contends that this finding is contrary to the weight of the evidence and that there should be a new trial on this point.

In the court's view, it cannot be said that the jury's determination was so seriously in error as to justify a new trial. It was well within the jury's province to make the decision which it did.

There was ample evidence to indicate that, at the time of FEI's termination, the two buildings involved in this case were very close to completion and that only a small amount of work remained to be done. Both testimony and documents supported this view. At the time of FEI's termination, O & Y prepared a summary of the work remaining to be carried out on each building - known as Building A and Building C. Both summaries indicated that the amount of uncompleted work was very small indeed in relation to the size of the project which FEI had contracted to perform. Jack Fogarty, Sr. testified that, in his judgment, the O & Y summaries accurately described what remained to be done in the two buildings. He estimated that the amount required to

perform the described work on Building A was $200,000-$250,000, and on Building C $350,000. Fogarty also gave his opinion about a proposal provided by another possible contractor, McNulty, in April 1986 as to completing the work on Building C. This proposal did not give a cost estimate, but gave an estimate of the amount of labor required - four to five months for two three-man teams. Fogarty assumed a 5-month period for the proposed McNulty work, or 20 weeks, and gave his opinion that the cost of employing the six men for 20 weeks would be an average per man of $1,000 per week, or a total of $6,000 per week, or a grand total for labor of $120,000. Fogarty estimated that, with materials, overhead and profit, this work would come to approximately $300,000.

In answering Interrogatory 3, the jury obviously accepted Fogarty's testimony and found an amount ($600,000) within the range of the figures testified to by Fogarty.

O & Y strongly objects to the jury's reliance upon Fogarty's estimates instead of the evidence that O & Y actually spent $4.6 million. But the jury could reasonably have serious questions as to how the very minor amount of work described in O & Y's own summaries could cost $4.6 million, a sum equal to about 40% of the original contract price. Moreover, the jury had been presented with a great volume of evidence, both testimony and documents, to the effect that O & Y's conduct had made the granite cladding job vastly more expensive than it should have been. Viewing the evidence as a whole, the jury was justified in finding that FEI was responsible for $600,000 and not $4.6 million.

To summarize the court's findings regarding Interrogatory 3, it is apparent that the jury believed that the entire amount paid to FEI prior to the termination represented the adjusted contract price, that the only amount expended by FEI over and above the adjusted contract price was what it spent post-termination, and, finally, that the reasonable cost of the post-termination work was $600,000. This view of the evidence was entirely reasonable.

With regard to the unrepaid loan of $473,250, this issue was not submitted to the jury during the trial. The post-trial motions do not deal with the loan in a satisfactory manner. The loan will be covered in the further proceedings in this case.

II.

FEI has also moved for judgment n.o.v. or a new trial. One ground for this motion is the contention which FEI made at the trial, and which was rejected at that time by the court, that O & Y's obligation to supply granite in proper quantity, sequence and quality was a condition precedent to any obligation on the part of FEI. FEI argued at the trial that O & Y failed to meet this obligation and that this failure totally destroyed any claim by O & Y of a default on the part of FEI. FEI sought to have the jury interrogatories framed in accordance with this contention. The court refused this request, ruling that under no view of the evidence could it be found that O & Y had failed to fulfill a condition precedent which relieved FEI of all responsibility. The court adheres to this view and denies this branch of FEI's motion.

The other ground for FEI's motion is the claim that O & Y retained approximately $1.6 million and that FEI is entitled to judgment against O & Y for this retention.

This claim, even if valid, would not be appropriate for a judgment n.o.v. or a new trial before a jury. It does not contradict any of the jury answers to the interrogatories. Perhaps there should have been an interrogatory on this point. However, we need not dwell at length on the procedural difficulties. The claim is wholly invalid on its merits. Even if O & Y retained the $1.5 million at some point, O & Y has more than made up this deficiency by the $7.8 million payments it made to and on behalf of FEI beginning in the fall of 1984, which have been described previously.

There is no basis for a judgment n.o.v. or a new trial on these points.

In its post-trial motions, FEI attempts to raise again certain arguments about discovery abuses by O & Y committed prior to the trial. The court dealt with the discovery problems in various pre-trial rulings, and no further rulings are necessary.

Finally, FEI appears to suggest that its pleading be amended to conform to the trial evidence. The nature and basis for the request is not at all clear. There is no demonstration of any need for such an amendment, and the application is denied.

III.

Before describing INA's post-trial applications, some background should be set forth.

It is familiar law that where a surety issues a performance bond regarding a particular contract, the surety is discharged from liability on the bond if the parties to the contract materially alter that contract without the surety's consent. In other words, the bond covers the contract referred to, not some other and different contract. *U.S. v. Freel*, 186 U.S. 309, 316 (1902); *Reliance Insurance Co. of Philadelphia v. Colbert*, 365 F.2d 530, 534 (D.C. Cir. 1966).

INA contended at the trial that the contracts covered by its two bonds were materially altered and that INA was thus discharged from liability. INA asserted several alleged material alterations. It was agreed that the court would decide these issues except for one claim of material alteration which would be submitted to the jury. This was the claim that the change in priority of construction of the buildings constituted a material alteration. Interrogatory 4 asked the jury whether they found that the change in priority constituted a material alteration. The jury answered in the negative.

Immediately after the trial INA made a motion for judgment n.o.v. with respect to Interrogatory 4. The court denied the motion. INA has now moved for reconsideration. This motion is denied. For reasons which already appear on the record, the jury was justified in finding against INA in connection with Interrogatory 4.

INA has presented the following additional grounds for its claim of material change, and these contentions are to be decided by the court without a jury:

a) O & Y's failure to properly supply granite to FEI.

b) Changes in the architectural drawings.

c) The sale of one building to American Express with the result of adding another layer of direction and control over FEI's performance.

d) Extensions in the amount of time FEI was supposed to complete the work.

e) Increases in the formally agreed adjusted contract price which were never agreed to by INA.

f) Payments to FEI which were not consented to by INA and which were above the amount O & Y considered to be the adjusted contract price.

The court would benefit from further discussion with counsel on the question of whether Items (a) - (f) should result in discharging INA from all liability. These unresolved items will be included in further proceedings regarding still other issues in the case which need to be resolved before the case is finally concluded.

Dated: New York, New York
September 19, 1988

S/ Thomas P Griesa
THOMAS P. GRIESA
U.S.D.J.

APPENDIX K - EXCERPTS FROM FEI FRCP RULE 16 AFFIDAVIT SWORN TO NOVEMBER 30, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O&Y TOWER C CORP.,
Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

-against-

FEI, LTD. ET AL.,
Third-Party Defendants.

85 Civ. 1238 (TPG)

F.R.C.P. Rule 16
AFFIDAVIT

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

I, John J. Fogarty, being duly sworn, depose and say:

1. As a Director of FEI, LTD. and as a Third Party Defendant in this action, I submit this Affidavit in support of the Court's conference direction to provide grounds for FEI's claims and/or counter-claims against O&Y.

2. To make the record clear, to the extent practicable, I adopt as my own sworn statement the representations made in the

November 4, 1988 Affirmation of FEI's counsel similarly submitted pursuant to Court direction.

* * *

8. To the extent not earlier identified in FEI's summary of claims (EXH. E), FEI increases its claim concerning Buildings "D/B Gatehouse" in the amount of IR£ 312,515 as identified in FEI's July 2, 1985, letter, attached as p.5 to Exh. F-3.

* * *

[LETTER FROM FEI LTD TO O&Y
DATED JULY 2, 1985]

FEI LTD
Athy Industrial Park
Athy, Ireland
[telephone/Telex numbers omitted]

2nd July, 1985

Olympia and York Battery Park Company,
245 Park Avenue, 25th Floor,
New York, 10167.

INVOICE/CHANGE ORDER -
BUILDINGS "D"/"B" GATEHOUSE

PRODUCTION TIME OVERRUN

The insistence on adhering to a production schedule in floor increments by O&Y - outside any contract arrangements - prevented long production runs, in particular panel types. This led to production being of a stop/go nature and extended the life of the jobs for 8 weeks.

The cost to FEI of this unwarranted extension by 8 weeks is as follows: -

Wages		
Athy Plant	@ IR£ 15,500 per week =	124,000
Overheads		
calculated	@ IR£ 2.15 per sq. ft. =	110,043
Profit		
contribution	@ IR£ 1.50 per sq. ft. =	77,472
		IR£ 312,515

Total due IR £ 312,515
@ 1.015 U.S.Dollars = $307,896.55

D. O'Reilly
Financial Controller

APPENDIX L - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 2, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER CORP.,
Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

- against -

FEI LTD., et al.,
Third-Party Defendants.

OPINION

85 Civ. 1238 (TPG)

Two matters are presently before the court for decision. The first is O & Y's motion to reargue the ruling contained in the court's opinion of September 19, 1988. The second is the question of whether INA is relieved of its surety bond obligations because of alterations in the contract[23] between O & Y and FEI.

I.

---

[23]There were actually two contracts and two surety bonds. However, they are closely related and have been referred to in the litigation in the singular - as one contract and one bond.

On September 19, 1988 the court handed down an opinion dealing with various post-trial motions. Among other things, the court denied O & Y's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, with respect to the jury's answer to Interrogatory 3. O & Y has now moved for reargument. O & Y argues that no issue or evidence was presented to the jury which could in any way allow it to find that the adjusted contract price was $22 million. O & Y contends that the adjusted contract price was conclusively established as being $14.1 million and that indeed the court so instructed the jury. O & Y further argues that, in any event, the alleged adjustments of the contract price up to $22 million could have no effect because they were not in writing as required by the contract. O & Y refers to a related New York statute. N.Y. General Obligations Law § 15-301(1).

In their response to the motion for reargument, FEI and INA have provided exhaustive citations to the trial record, which demonstrate the lack of merit in the O & Y contentions.

Although the questions to the jury were drawn in a somewhat narrow and specific manner, the court's instructions to the jury explained the nature of the basic problem. The essential issue was whether FEI had defaulted in performing under the contract and whether O & Y had sustained loss or damage by reason of such default. It was further explained to the jury that O & Y was not making its case in regard to default by way of contentions about specific construction defects, delays, etc. O & Y had pitched its case solely on the contention that FEI's default consisted of becoming financially unable to perform its obligations under the contract. The jury was then told that there were further issues about whether *O & Y* had failed to perform its obligation with regard to supplying granite to be used by FEI and whether such failure was the cause of FEI's financial inability, if such inability were found. Finally, the jury was asked to find, if the answers to the above questions made it appropriate, the amount of expenses above the adjusted contract price which 0 Y & reasonably incurred to complete or repair FEI's work under the contract. In the instruction regarding this issue, the court referred to O & Y's Exhibit 15, in which O & Y listed its contentions regarding payments over and above the adjusted contract price. In that exhibit, O & Y presented the figure of $14.1 million as being the

adjusted contract price and presented other figures indicating that $12.9 million had been spent over and above that adjusted contact price. However, the court did not in any sense instruct the jury that it should accept any figure from that exhibit and told the jury that they should determine whether the figures were accurate.

The jury returned an affirmative answer to Interrogatory 1, thus finding that FEI did become financially unable to proceed with the contract. In its answers to Interrogatory 2a and 2b, the jury found that O & Y had failed to perform its obligations regarding the furnishing of granite but that this failure was not the cause of FEI's financial inability to proceed with the contract.

Interrogatory 3 asked:

> 3.What is the amount of expenses above the adjusted contract price, if any, that you find by a preponderance of the evidence O & Y reasonably incurred to complete or repair FEI's work under the contract?

This interrogatory required the jury in effect to find the damage or loss to O & Y attributable to the default of FEI (the financial inability of FEI to proceed with the contract). The jury found that this amount was $600,000.

As described in the September 19, 1988 opinion, it is perfectly clear that this $600,000 related to the time following O & Y's termination of FEI in April 1986. However, O & Y contends that it was conclusively proved that the default of FEI through financial inability occurred in the fall of 1984, and that the jury was entitled to consider no other date as the time of the default. O & Y further argues that all the "extra" expenses incurred after that time were damages due to the default. Finally, O & Y argues that it was conclusively proved that the adjusted contract price was $14.1 million, which was the amount of the original contract, with formalized adjustments, as of the fall of 1984. O & Y argues that there was no basis for the jury to believe that there were any further adjustments to the contract price, and that the evidence mandates a finding that the amounts paid to or on behalf of FEI above the $14,1 million are damages due to default.

All these contentions of O & Y ignore certain prominent uncontradicted testimony presented by FEI, testimony which the jury asked to have repeated to them in the final stages of their deliberation. This testimony was that, beginning in the fall of 1984, O & Y was demanding an increased level of performance by FEI - consisting of a greatly increased commitment of labor and equipment - which raised FEI's cost levels far beyond what had been contemplated. FEI asserted that it could not possibly afford what it termed these unreasonable requests. Nevertheless, O & Y executives virtually begged FEI to stay on the job and to perform at the increased level of production. O & Y assured FEI that it would not be hurt and that it would be made whole, and followed up these assurances with $7,8 million additional payments, over and above the $14.1 million formally adjusted contract price.

A fair reading of the record shows that the jury was presented with the issue of whether these additional payments constituted further adjustments to the contract price. Moreover, there was ample evidence to support a finding that all payments made prior to FEI's termination in April 1986 were such agreed upon adjustments.

There is another important consideration justifying the jury's verdict. The jury found, in its answer to Interrogatory 2a, that O & Y had not fulfilled its obligations with regard to the granite supply. Although the jury then found that this failure on the part of O & Y was not responsible for FEI's financial inability (as found in its answer to Interrogatory 1), nevertheless the jury's finding regarding the granite supply was not without significance. The record is replete with evidence, including O & Y's internal documents, indicating the gravity of the difficulties created by O & Y with regard to the granite supply, and with regard to other matters for which O & Y, not FEI, was responsible. The jury was justified in concluding that much of the additional expense, over and above the formal adjusted price of $14.1 million, was due to O & Y's own mismanagement regarding the granite supply and other circumstances which were caused by O & Y and which should not be charged to FEI.

It should be noted that the jury was not required to find, either by the court's instruction or by anything conclusively proved in the evidence, that the default by way of FEI's financial inability occurred in the fall of 1984. Under the evidence, the jury could

well have found that FEI's financial problems in the fall of 1984 related to its difficulty in meeting O & Y's *increased demands*, rather than requirements under the original contract, and that what occurred was an alteration and adjustment of the contract rather than a default by FEI. Of course, the jury found that at some point there was a default by FEI resulting in damages to O & Y of $600,000. The jury was not asked to specify the time of the default, and no party to this action can now complain about the lack of such a specification. It can simply be said that the jury would have been justified in finding the date of default as being the time of the termination in April 1986 or some time thereabouts.

It is worth noting that the questions presented to the jury were unusually complex. As one ponders the result reached by the jury, the soundness and good sense of their decision becomes more and more apparent. With regard to the issue of damages, it is well to keep firmly in mind that the default relied upon by O & Y was the occurrence of financial inability on the part of FEI. The jury obviously had the discernment to see that this kind of default could hardly operate to magnify this project from one in the range of $10-14 million to a $22 million or a $27 million project. Those enormously increased costs must have been due to factors other than FEI's financial inability, and the jury so found.

As a final matter, it is necessary to deal with O & Y's argument based upon the provision of the contract with FEI requiring changes to be in writing, and the statute providing that, where there is such a contractual requirement, the contract cannot be changed by "an executory agreement unless such executory agreement is in writing." N.Y. General Obligations Law § 15-301(1). O & Y fails to cite the New York cases which state that such a contractual requirement and the New York statute are not an absolute bar to oral modifications of a contract, and that a party may be estopped by his conduct and words from insisting upon a writing. *Rose v. Spa Realty Associates*, 42 N.Y.2d 338 (1977); *American Bag & Metal Co. v. Alcan Aluminum Corp.*, 115 A.D.2d 958, 959 (4th Dept. 1985). A stronger case of estoppel could hardly be imagined than that presented by the uncontradicted evidence at the trial here. O & Y urged FEI to go forward with its work, at an increased commitment of resources, for over a year. O & Y received the benefit of FEI's services and paid for them. O & Y is estopped from claiming that the adjustments to

the contract are invalid because of lack of a writing.

II.

It is now necessary to deal with the contention of INA that the construction contract it bonded was materially altered, thus discharging INA from liability.

The established rule and the relevant cases are set forth in the opinion of September 19, 1988. A surety is discharged from liability on the bond if the parties to the contract covered by the bond materially alter that contract without the surety's consent.

INA has asserted several claims of material alteration. It was agreed that the court would decide these, except for one which was submitted to the jury. This was the claim that the change in priority of construction of the buildings constituted a material alteration. The schedule incorporated into the contract provided that Building C was to be completed before Building A. As it turned out, Building A was given priority over Building C. The jury was asked whether this change of priority constituted a material alteration, and answered in the negative.

The court now rules in favor of INA on its other claims of material alteration. There was a combination of circumstances which went to make up this material alteration. It should be noted that the change in priority was part of that combination. The jury's verdict, dealing with the priority change in isolation, does not foreclose this ruling by the court.

A most important part of the contract between FEI and O & Y was the obligation of O & Y to furnish FEI granite in proper quantity and sequence. The jury has found, and the court fully agrees with the jury's finding, that O & Y materially breached this obligation. Despite this breach, and despite other difficult circumstances, including the change in priority of the buildings, FEI persevered with the job in response to the urgings of O & Y. However, the nature of FEI's work and the relationship between the parties became sharply altered from what had been contemplated and provided in the contract which was bonded by INA. A vivid indication of this can be found by comparing the original contract price with the amount ultimately paid by O & Y for the granite cladding work. The original contract price was $10.6 million, and the amount bonded by INA was $10.6 million.

By the time FEI was terminated in April 1986 O & Y had paid about $22 million to, or for the benefit of, FEI. Following FEI's termination, O & Y laid out another $5 million on the job, making the total cost $27 million.

Simply put, INA did not bond a $22 million project or a $27 million project. Over a period of time,, the nature and magnitude of the job was drastically changed. It is clear that the contract bonded by INA was materially altered.

At no time did INA consent to such alteration. Although there were communications between O & Y and INA at various times, including claims under the bond and commencement of this lawsuit in early 1985, O & Y continued to pursue its dealings with FEI as already described in this opinion and in the September 19, 1988 opinion. At no time did INA consent to the adjustments which were going on. More important, it is clear that INA had nothing approaching full knowledge of what was occurring. A meaningful development of the facts did not take place until the discovery and trial in this lawsuit, a process which was difficult in the extreme.

CONCLUSION

The court rules once again that the jury's answer to Interrogatory 3 should stand. The court also rules that INA is discharged from liability on its bond because of material alteration of the contract covered by the bond.

The remaining issues to be resolved before a final judgment can be entered will be covered in further proceedings.

SO ORDERED.

Dated: New York, New York
June 2, 1989

THOMAS P. GRIESA
U.S.D.J.

APPENDIX M - FINAL JUDGMENT
AS TO
INSURANCE COMPANY OF NORTH AMERICA
OF THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
DATED SEPTEMBER 24, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,

Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA,
Defendant.

INSURANCE COMPANY OF NORTH AMERICA,
Third-Party Plaintiff,

-against-

F.E.I., Ltd., JOHN J. FOGARTY and JEAN FOGARTY,
Third-Party Defendants.

85 CIVIL 1238 (TPG)

FINAL
JUDGMENT
AS TO DEFENDANT
INSURANCE COMPANY
OF NORTH AMERICA

SEAL:
U.S. DISTRICT COURT
FILED
OCT 1 1991
S.D. OF N.Y.

A Jury Trial before the Honorable THOMAS P. GRIESA, United States District Judge, having begun on February 22, 1988, and at the conclusion of the trial the jury having answered the

attached "Interrogatories for Jury," and the jury in so doing having returned a verdict in favor of Olympia & York in the amount of $600,000.00, for incurred expenses, and the Court having reserved decision on the remaining issues, thereafter plaintiffs' having moved for judgment notwithstanding the verdict and/or a new trial, Defendant Insurance Company of North America having opposed plaintiffs' motion and having cross-moved for (1) a directed verdict , or in the alternative granting reargument to defendant on its oral motion for judgment notwithstanding the verdict made at the conclusion of the trial, and (2) a new trial on all issues if plaintiffs' motion for a new trial was granted, third-party defendant F.E.I., Ltd., having opposed plaintiffs' motion and having cross-moved for judgment notwithstanding the verdict or for a new trial if plaintiffs' motion for a new trial was granted, and the Court thereafter on September 4, 1991, having handed down its order for judgment; directing the Clerk of the Court to enter a final judgment dismissing with prejudice the plaintiffs' complaint in its entirety against defendant Insurance Company of North America, and further ordering that there is no just reason for delay in the entry of such final judgment, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed in its entirety with prejudice as to defendant Insurance Company of North America.

DATED: New York, New York
September 24, 1991

S/ James M Parkison
Clerk

APPROVED:

S/Thomas P. Griesa
U.S.D.J.

APPENDIX N - SELECTED EXHIBITS TO FEI MOTION FOR TRIAL DATED APRIL 9, 1993 (VARIOUS ITEMS OF CORRESPONDENCE)

[LETTER FROM COUNSEL FOR O&Y TO COUNSEL FOR FEI DATED APRIL 23, 1990]

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE
NEW YORK, N.Y. 10022
---
(212) 836-8000

[OTHER ADDRESSES OMITTED]

April 23, 1990

Daniel J. O'Callaghan, Esq.
230 Park Avenue
New York, New York 10169

Re: *O&Y v. INA v. FEI*

Dear Dan:

After John Zuccotti was unable to attend our first scheduled meeting, we have had to defer rescheduling this meeting in order to accommodate Mr. Fogarty, Sr.'s trips to Ireland and your recent court appearance. We have now agreed upon Thursday, May 10, 2 P.M. at 237 Park Avenue, 12th floor. See you then.

Yours truly,

S/_____
Richard C. Seltzer

RCS:rf
cc: Harold H. Wolgel, Esq.

[LETTER FROM COUNSEL FOR FEI
TO COUNSEL FOR O&Y
DATED NOVEMBER 26, 1991]

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
230 PARK AVENUE
NEW YORK, N.Y. 10169

212-370-1000
[TELECOPIER/TELEX NUMBERS OMITTED]

Richard C. Seltzer, Esq.
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, NY 10022

Re: Olympia & York v. INA v. FEI, et al.
85 Civ. 1238 (TPG)

Dear Richard,

Now that O&Y's action against INA has been resolved, FEI again proposes that our meeting of principals resume so that the parties may conclude this case through a settlement rather than through continued litigation. Please telephone at your earliest convenience.

Sincerely,

Daniel J. O'Callaghan

DJOC: wr
cc: FEI

[LETTER FROM COUNSEL FOR FEI TO HON. THOMAS P. GRIESA, UNITED STATES DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 7, 1992]

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
230 PARK AVENUE
NEW YORK, N.Y. 10169
212-370-1000
[TELECOPIER/TELEX NUMBERS OMITTED]

January 7, 1992

Hon. Thomas P. Griesa
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, NY 10007

Re: FEI v. O&Y
85 Civ. 1238 (TPG)

Dear Judge Griesa,

For quite some time, FEI has sought to resolve the remaining items in dispute with O&Y, particularly through meetings at the executive level of FEI and O&Y officers. This effort has been unsuccessful. Moreover, O&Y has not responded to FEI's telephone or written invitations for continuation of these discussions. Thus, FEI requests that at the Court's earliest convenience, a conference be scheduled.

Respectfully,
S/_____
Daniel J. O'Callaghan

DJOC: wr
cc: FEI
Richard C. Seltzer, Esq.

(2) Supreme Court, U.S.
FILED

941364 FEB 13 1995

No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1994

FEI, LTD., JOHN J. FOGARTY
and JEAN FOGARTY,

Petitioners,

-against-

OLYMPIA & YORK BATTERY PARK COMPANY, also known as WFC TOWER A COMPANY; O&Y (U.S.) DEVELOPMENT CORP., as successor to O&Y TOWER C CORP.; OLYMPIA & YORK TOWEP. B COMPANY; OLYMPIA & YORK TOWER D COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDICES, CONTINUED

DANIEL J. O'CALLAGHAN, ESQ.
17 Battery Place
New York, New York 10004
(212) 222-4200
Counsel of Record and
Attorney for Petitioners
FEI, Ltd., John J. Fogarty.
and Jean Fogarty

88 pp

APPENDIX O - NOTICE OF MOTION FOR TRIAL UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK WITH MEMORANDUM ORDER ENDORSED DENYING MOTION, DATED MAY 3, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMO ENDORSED

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER CORP.,
Plaintiffs,

- against -

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

- against -

FEI LTD., et al.,
Third-Party Defendants.

85 Civ. 1238 (TPG)
NOTICE OF MOTION FOR TRIAL

SEAL:
U.S. DISTRICT COURT
FILED
APR 12 1993
S.D. OF N.Y.

RECEIVED IN CHAMBERS
OF CHIEF JUDGE THOMAS P. GRIESA

APR 14 1993

PLEASE TAKE NOTICE that the undersigned will move this Court before the Honorable Thomas P. Griesa, on the 29th day April, 1993, at 10:00 A.M. or as soon thereafter as counsel may be heard for an Order (i) pursuant to Rules 16 and 40 of the Federal Rules of Civil Procedure granting Third-party Defendant FEI, Ltd., John J. Fogarty and Jean Fogarty ("FEI") a trial with precedence upon FEI's claims against plaintiff, Olympia & York Battery Park Company and related/affiliated companies ("O&Y"), and (ii) for such other and further relief as to the Court seems just and proper.

Handwriting:

Motion denied.
So ordered
5/3/93 Thomas P. Griesa
U.S.D.J.

APPENDIX P - EXCERPTS FROM FEI'S MAIN BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 10, 1993

STATEMENT OF FACTS .

FEI's claims - those initially sought to be presented during the O&Y Trial - have been preserved for trial as *severed* and ruled by the Court to be "out of the case". A review of the Trial Transcript so records:

I FEI Witness, Managing Director, Francis Guilfoyle - Direct
[March 8, 1988]

MR. O'CALLAGHAN: Attached [to **Ex 317**]... was another exhibit, part of the complaint... identify it as **318** ....

MR. O'CALLAGHAN: [T]his document has been part of the pleadings for three years... (A 106-07).

THE COURT: [I]ntroduce the cover page... this was a memo.... to O&Y, July 5, 1985 covering many items... (A 108).

MR. O'CALLAGHAN: [T]he other pages are support for the other claims that we had... that other witnesses will address the other claims....

THE COURT: All of these things, do they pertain, does all of this pertain your damage claim?....

MR. O'CALLAGHAN: It is my understanding that these pages, the pages right behind Mr. O'Reilly's summation itemize the items... (A 109).

THE COURT: [318] is marked for identification, and give it all to the jury... they see the first page and they will mark it 318A, and page 21 they will mark 318 B...

(Defendants Exhibits 318 A and 318 B... were received in

evidence). (A 111-12).

Q. Mr. Guilfoyle, can you identify 318?...

A. It's our best estimate *at the time* of the moneys owed to us by O&Y. (A 113).

II FEI Witness, Chairman, John J. Fogarty - Cross
[March 15, 1988]

THE COURT: *...Now, what I am going to rule is this*:

That from here on out until further notice, the *evidence is to be directed*, both direct-examination and cross-examination, to the *stone problem and the changes in building priorities*....

All further cross-examination of Mr. Fogarty, Sr., will be directed to that point, and those points and *those points only*. All further presentation of additional witnesses by *FEI will by limited to those points*... (A 116)....

[I] am going to... *tell the jury* that I have ruled in this way.... I want to have them and the attorneys *focus only the two problems* which really they will have to decide, and *only those problems will resolve this case*.

[T]hey are going to be asked to *switch their consideration* for the time being away from these issues. They will hear about the stone problem and the switch in priority problem,... and that's the way we will proceed. (A 117).

MR. O'CALLAGHAN: The other point, your Honor,... *the claims we began to develop*..., the excess wage claim..., B and D issues which began to be presented, *they are going to be put on the back burner*?

THE COURT: *Yes, absolutely*. (A 118-19).

(Jury present).

JOHN J. FOGARTY, resumed.

THE COURT: In my view *the case rests... on this question of the stone problem and the switch in priorities. That's as far as you are concerned right now....* (A 124).

* * *

THE COURT: *Does the defense case rest?*

MR. O'CALLAGHAN: *To the extent*, your Honor, *you have limited the trial* to the issues --

THE COURT: *I understand.*

MR. O'CALLAGHAN: Yes, we do. (A 128).

* * *

III "You won't have a jury".

[March 23, 1988]

MR. O'CALLAGHAN: More or less in midstream in the case... you essentially directed that we all turn out attention to the stone to hit heart of the case.

Now, FEI at that time was right in the middle of presenting its claim..., (A 129) but all that was abbreviated.

In fact, it wasn't presented, and so I have reflected on this because in order for FEI to present these claims, it is going to take some time....

THE COURT: I'll tell you, Mr. Callaghan, you are not going to have a jury.

MR. O'CALLAGHAN: Pardon me?

THE COURT: *You won't have a jury.* I freely concede that in order to get this case confined to what I think... you can't have a lot of people sitting in a jury who are feeling like they are chained to their seats and they are totally unwilling, you don't want that.

Now, I was pretty confident that in order to get this case into a span which was workable, that we had to somehow arrive

at some reasonable definition of the issues.... (A 130-31).

Now, *as far as your counterclaim for damages* for breach of contract, if you are telling me that you need several more days to present that, I'm telling you you don't have a jury, and *I will simply sever it and we will call another trial*, because it is not practical....

[S]o we have limited the issues, and so be it. I'm, not going to have this jury sitting here and listening to the mutual recriminations about everything that went on in the summer of 1984 about the handling of the sewage, the garbage, the lights, the tools, the welding machines, the elevators -- it is not going to be done.

MR. O'CALLAGHAN: ...Defendants' 317 is in evidence and we were sort of in the middle of presenting--

THE COURT: I didn't cut you off as far as 317.

MR. O'CALLAGHAN: I think you did, judge.

THE COURT: No, I didn't.

MR. O'CALLAGHAN: [M]r. Fogarty, Sr. was testifying about it and we had some voir dire, and the jury was asked to leave, and that's where the focus of the case shifted to stone again.... (A 131-32).

THE COURT: ...I don't think you were ever cut off from presenting--....

[I] don't believe you were ever cut off or prevented from showing....

Now, you look at the record, and if you were prevented and cut off, well, I will stand corrected. *What I was trying to cut off wasn't your showing the back-up for your damage items*.... (A 133-34).

But you can read the record over and *correct me if I am wrong*. The point is that you have rested your case and, I don't

think you were prevented from putting anything on about your damages that you wanted to put on.

THE COURT: Before you go any further, you study the record. A 135-36.

MR. O'CALLAGHAN: I have an understanding of it... and I represented at that time we had claims to discuss, including the anticipatory breach on Building B and D, and when I rested my case, it was on the understanding it was being *rested on the A and C stone issue alone*.

THE COURT: I think you better re-study the record. I don't think that's a faithful recital of it....

One way or the other, *we will get this jury instructed by the end of the day tomorrow*. (A 136).

(Trial resumed)

IV Severance: "The Third-Party claims [are] really out of the case"

(In open court, jury not present) **[March 24, 1988]**

MR. O'CALLAGHAN: Last evening we had some discussion about FEI's claims and I went through the transcript.... I made three pages.... [A 116-119].. close on [A 128].

THE COURT: All right.

(Pause)

THE COURT: *Well, you are absolutely right. Absolutely right.*

So what do you propose?... (A 137).

MR. O'CALLAGHAN: [I] have no choice but to ask that they be *severed and tried at a later time*.

THE COURT: You are certainly right in your memory of the transcript, and you have shown it to me. And we have to deal

with it in a sensible way.... (A 138).

And what is *O&Y's position* on that?

MR. SELTZER: *We agree to the severance of FEI's third party claims against O&Y.* We agree to the severance.

THE COURT: The *application is granted on consent*....

MR. O'CALLAGHAN: One further point, your Honor. May I ask that the court provide some *instruction to the jury* about FEI's claims in whichever way is appropriate.

THE COURT: *Sure. I will do it.*

MR. O'CALLAGHAN: They will be held in abeyance.... (A 139).

THE COURT: ***The matter of the third party claims is really out of the case. I think it would be most confusing to bring that up***.

Let's bring in the jury. Thank you all very much.... (A 140).

* * *

THE COURT: All parties rest now?... (A 141).

MR. O'CALLAGHAN: With the only reservation we had --

THE COURT: What we discussed this morning?

MR. O'CALLAGHAN: Yes. (A 142).

* * * * *

FEI's claims as so "severed", "out of the case", "confusing", thus, removed from jury consideration, thereafter were precluded from even an offer of proof. In/about October, 1988, notwithstanding objection, notwithstanding prejudicial, and

notwithstanding that no similar imposition was required of O&Y, FEI was ordered promptly to document "chapter and verse" support for its claims. A 217-19. In compliance, presentation was made in November, 1988, (A226-310), with full reliance and "reservation of all rights" as contained in "*prior FEI pleadings*", in other written submissions and upon the effect of the Court's trial preclusion rulings, as above referenced and for "reasonable overhead and profit". (A 226-27).

FEI's Ex. 318 is a compilation of FEI claims as of July, 1985, which were attempted to be presented at the O&Y Trial with/through witness elaboration and other supporting evidence, but were not so presented into evidence and/or were withdrawn from jury consideration upon the Court's ruling for severance. A 370-85. Three (3) years earlier, Ex. 318 had been presented in this dispute as "**Ex 2**" to FEI's Third-Party Complaint. A 24-39.

In substantial content, Ex 318 does not address claims for the "handling of the sewage, the garbage, the lights, the tools, the welding machines, the elevators", but rather evidences significant claims as known and itemized, e.g., by letter to O&Y at least as early as June 30, 1985. A 24-25, 370.

Subsequently, upon a November, 1988, Court direction to document "chapter" and "verse" its claims, FEI presented support for its claims, e.g., upon Buildings A and C near $900,000 for "overhead" and in excess of $1M for retentions, a "tax claim" in the amount of $1M, a Building B Tower claim in the amount of at least $473K, a Building D claim in excess of $800K and a defense (set-off) to O&Y's loan claim.(A226-310; i.e., exhibits for "overhead" and "retentions" claims, A 235-50; tax claim, A 251-65, 292-300, 306-10; Building B Tower claim, 277-85; Building D claim, A 301-05; loan set-off, A 266-76. Post-trial, FEI referenced its claim for at least $1,589,225, upon Buildings A and C for overhead and profit grounded upon trial evidence, e.g., O&Y Ex 15 admissions.See **infra, Point II**. A 286, 387. Repeatedly, FEI provided notice to O&Y of its claims (and years for discovery), viz.:

(i) FEI Controller letter dated June 30, 1985 (Ex 318; A 24-39, 370-85);

(ii) FEI Third-Party Complaint, Ex 2; A 24-39;

(iii) Trial Ex 318; A 370-85;

(iv) FEI Rule 16 counsel affirmation at ¶1: ("FEI provides this information with *reservation of all rights including contentions*, legal arguments and other matters addressed *in prior FEI pleadings*..." A 226-27; and

(v) FEI Rule 16 party affidavit, (Ex 318, pp 3-6; A 287-310).

As stated by FEI's Chairman, John J. Fogarty:

> "Upon a nearly six (6) week jury trial... O&Y was provided with more than full opportunity for presentation of its claims. Meanwhile, after it became apparent that O&Y's... claims for in excess of $13 million quickly and rightfully were evaporating before the jury, nonetheless, under Court direction, FEI's claims were severed upon assurance for a subsequent, separate trial... [A]t no time and under no circumstance was there any doubt... that the case was being presented to the jury other than exclusively upon O&Y's claim for "overage"... against which FEI was limited expressly to presentation of some defenses...*[F]EI was limited by the Court to a defensive action, not to presentation of affirmative claims*. Notwithstanding a jury verdict which vindicated FEI... nonetheless, immediately thereafter, commencing in October, 1988, repeatedly and unfairly the Court characterized FEI's contract performance as in "default"....A 408. (Emphasis added).

Subsequent to numerous telephone and other verbal communications commencing immediately after FEI's November, 1988, submissions and continuing until abandoned by O&Y, the parties conferred and corresponded concerning settlement, eventually concerning a settlement meeting of principals. A 386-96.

Significantly, FEI provided notice of its Building D claim, one in excess of $800K, by letter dated July 5, 1985, the notice annexed to FEI's Third-Party Complaint:

MONIES OUTSTANDING AS AT 30/6/1985

* * *

16.	Pending Change Order - Production Time Overrun Building D/B...	307,896.55
19.	Pending Change Order - Unfilled Containers Building D/B	118,088.82
20.	Pending Change Order - Accommodations/Office Facilities	10,775.15
21.	Pending Change Order - Granite Disruption/ Associated Costs...	50,458.58
25.	Pending Change Order - Excess Shipping Costs/ Building D... and	352,191.00
28.	Pending Change Order - Hastings to Buildings D Jobsite Costs....	12,812.50

* * * * *

(A 24-27, 371-73)

O&Y's uncontested reluctance to address for settlement virtually all Building "D" claims is referenced in one of the several "settlement analyses" exchanged between the parties referencing O&Y's "deal-breaker" insistence concerning O&Y's $1.9M of Building "D" claims, those never set forth "chapter and verse" nor so required by the Court. A 365, 386-87, 409-10). In addressing FEI's $800,000 Building D, claim, uncontestedly, Fogarty stated:

> During the preliminaries to the settlement discussions, O&Y indicated an unwillingness initially to address FEI's

> significant claim (approximately $800,000) relating to Building D, exclusive of retention, as in sum and substance is itemized in Ex2, annexed to FEI's Third-Party Complaint. This claim at O&Y's insistence was *to be considered separately* by the parties at a settlement discussion subsequently to be scheduled. Thus, in the November 30, 1988, FRCP Rule 16 Affidavit, at ExF, deponent made reference with clarification to this understanding in context of the "B/D Gatehouse". [A 289, 302-05] This building D claim in excess of $800,000 as contained in FEI's pleadings and trial Exhibit 318 has not been withdrawn or abandoned but remains pending, as *severed* in 1988 by the Court, notwithstanding O&Y's unwillingness to address the claim's existence at settlement or otherwise and the Court's... insistence for its 1993 dismissal rather than... trial of... this claim, as severed. A409-10. (Emphasis added).

In consequence of O&Y's refusal to discuss settlement, by letter January 7, 1992, FEI requested a conference, eventually held on February 13, 1992. A 396. At the conference, O&Y represented that it would not settle FEI's claims at any value, rather urging dismissal of the claims. Thereupon, in conclusion, the Court scheduled a trial of FEI's claims for the last two (2) weeks of August, 1992. A397. Thereafter, FEI did not receive any communication from the Court, nor in any manner communicate to the Court until July 28, 1992, when FEI wrote advising of its readiness for trial, requesting from O&Y a notice of any change in the financial status of O&Y. A 398.

On August 17, 1992, FEI appeared for trial. O&Y was not in attendance. A trial in another matter was in progress and FEI was advised that a trial of FEI claims was not scheduled to proceed. This was the first and only communication from the Court that the February 13, 1992, Court direction for an August, 1992, two (2) week trial of FEI's claims had been rescinded. A 399-400. Subsequently, FEI received a copy of O&Y's "By Hand" to the Court letter dated August 17, 1992. A 401. A conference was held on September 30, 1992. At the conference and in subsequent letters, FEI urged that the matter proceed to trial; O&Y declined to consider settlement. A 402-05. * * *

APPENDIX Q - EXCERPT FROM O&Y'S OPPOSITION BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 13, 1993

* * *

C. The November 1988 Claims Were Not Severed

FEI predicates its appeal entirely on the fact that the district court severed FEI's Third-Party Complaint. However, FEI proceeded to present all of its third-party claims on Buildings A and C to the jury. The Third-Party Complaint consisted of third-party claims against O&Y for amounts allegedly owing on all four buildings. The amounts claimed in that pleading with respect to Buildings A and C consisted of claims for an additional $6,846,857 beyond the $14.1 million contract price, including a claim for excess wages ($4,068,168), a change in schedule ($1,441,687), stone repair ($898,073), and marble ($438,929). FEI claims that the effect of the severance was to preclude FEI from arguing to the jury the merits of these individual claims. However, FEI was *not* precluded from presenting evidence and argument to the jury that O&Y actually agreed to pay for all these claims.

Thus, even though the Third-Party complaint was itself severed, the summary of FEI's Claims in that pleading for $6,846,857 beyond the $1.4 million contract price *was* admitted into evidence (as Exhibit 317). (A 23). Indeed, the summary of FEI's claims was Exhibit 1 to its Third-Party Complaint. (*Id.*) Therefore, even though the Third-Party Complaint was severed, FEI suffered no prejudice because the entire amount of its third-party claims on Buildings A and C *was* submitted to the jury anyway. Furthermore, the jury effectively awarded FEI *more* than the amount it was claiming, thereby disproving any possible claim of prejudice. In short, while FEI's complaint was nominally severed, FEI presented all of the evidence of its damage claims to

the jury -- and won![24]

FEI's suggestion that it *was* precluded from introducing evidence on Buildings A and C because another exhibit, Exhibit 318, was not admitted (FEI Br. at 13) is frivolous. Exhibit 318 is a 15-page collection of documents purporting to back up the summary of FEI's claims on Buildings A and C which *was* admitted into evidence (as Exhibit 317). Thus, for example, Exhibit 317, which was submitted to the jury, lists an FEI claim for "excess wages" in the amount of $4,068,168. The exact same claim appears in Exhibit 318, which was not submitted to the jury, at pages A 31-32, under the heading, "INVOICE/CHANGE ORDER -- A & C -- RE EXCESS WAGE COST" in the amount of $4,068,168. Similarly, Exhibit 317 (in evidence) also lists an FEI claim for "priority change" in the amount of $1,441,687. The exact same claim appears in Exhibit 318 at page A 28 under the heading "REQUEST FOR CHANGE ORDER" due to "change of priority from Building "C" to Building "A" in March 1983" and seeks a total of $1,442,687.[25]

In short, FEI's complaint about Exhibit 318 being "withdrawn from jury consideration upon the Court's ruling for severance" caused no prejudice to FEI whatsoever because the same information with respect to Buildings A and C *was* presented to the jury in Exhibit 317.

---

[24]If FEI contends the November 1988 claims were *not* set forth in the Third Party complaint -- and thus not part of the summary presented to the jury -- those claims would now be barred by the statute of limitations. In New York, the statue of limitations for breach of contract actions is six years. (CPLR 213). The November 1988 claims were not asserted in any pleading and concern payments FEI contends O&Y should have made by April 1986. Assuming these claims were not, in fact, covered by the jury verdict, the statute of limitations on them would have run in April 1992.

[25]Exhibit 318 was excluded because, among other things, it included back-up for FEI's B and D claims which had been severed from the trial. The trial only concerned claims on Buildings A and C.

Finally, it should also be noted that FEI never complained at the trial that it had evidence of *any* additional claims which it was not permitted to introduce. To the contrary, the trial judge made clear that FEI was never cut off from presenting its damage claim, and FEI's counsel admitted that all of FEI's damage claims were set forth in Exhibit 317 (in evidence) and his only complaint was that, because of some confusion, some of the backup for the $4,068,168 excess wage claim on Exhibit 317 did not somehow get admitted. (A 132-34).

* * *

APPENDIX R - EXCERPTS FROM FEI'S REPLY BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED OCTOBER 27, 1993[26]

* * *

POINT II: The O&Y Trial Was Not About "What O&Y agreed to pay"

FEI does *not* seek to be compensated "twice" for the $7.8M monies advanced by O&Y during the "pre-termination period," i.e., November, 1984 - April, 1986, advances concerning which the district court determined": [i]t's quite obvious the jury didn't award a penny of that." (SA 121). Rather, FEI seeks a trial, **inter alia**, predictably upon uncontested claims, FEI's "A" and "C" claims for overhead ($900,000), taxes ($1,000,000) and retentions ($735,000), claims *not* included in any of the pre-termination monies advanced by O&Y, monies advanced, rather, self-interestedly for O&Y's own account.

These claims are supported in the district court ordered FEI "chapter and verse" November, 1988, submissions (the "**Chapter and Verse Submissions**"), those presented by FEI's Chairman John J. Fogarty ("**Fogarty, Sr.**") and through FEI's counsel, the latter submissions adopted by Fogarty, Sr. "as his own sworn statements". Thus,

> **Buildings A/C Claims** -
>
> (a) During the [pre-termination period]... O&Y failed... to pay... FEI's *overhead* expenses,... *as agreed*, ... O&Y's advances... prior to termination included monies *only* for FEI vendors, field payroll and partial tax obligation, but *not for FEI overhead*, which FEI paid from

---

[26]The prefix "A" is to the Joint Appendix; the prefix "SA" to the Supplemental Joint Appendix. Citations to the trial transcript which were not included in either appendix appear as "T."

other income sources... [F]EI incurred overhead expenses in the approximate amount of *$900,000* for which FEI seeks reimbursement.

* * * *

(A 227-28).

(b) Similarly, FEI presents a claim in the amount of $1M for... *employment withholding .tax assessments* imposed upon FEI... in breach of O&Y commitment to compensate FEI for this obligation.... Similar to the jury and Court conclusion that FEI did not expect to return to O&Y pre-termination advances, FEI did not continue on the Project anticipating that it and its officers *alone*, would be held accountable for the assessment, a liability *FEI need not have incurred* if simply FEI had abandoned the Project in Fall, 1984....

* * * *

(A 229-30).

Retentions -

FEI presents a claim for *Retentions* earned on Buildings... , as follows:

A/C	$ 735,213	
"B"	49,683	
"D"	261,886	
Wintergarden	12,368	
	$1,059,150	
	- 456,251	(Loan)
Retention Monies Due FEI	$ 602,899	

(A 232).

[O&Y] PX 15 (A 104) admits that the amount of *$1,589,225* was due FEI upon the contract but *not* paid, a substantial portion of which amount is comprised of the $735,213 A/C Retention. The other monies withheld by O&Y identified on Exh. 15, the amount of $854,012, are monies earned by FEI for which requisitions were submitted but for which O&Y did not compensate FEI.

* * * * (A 233).

FEI's Chairman, Fogarty, Sr., added:

> ....[I] was assured repeatedly that FEI's *overhead* expenses then being incurred for Buildings A and C would be reimbursed to FEI... directly by O&Y and/or through the monies FEI would earn in activity upon Buildings B, D, and Wintergarden, contracts which O&Y promised to FEI at profits which would absorb the overheads advanced by FEI on Buildings A and C....
>
> Likewise, FEI was repeatedly assured that its *Retention* monies earned through 1984 and later, funds in excess of $700,000, would be returned to FEI upon completion of the Project. Similarly, I repeatedly was assured that FEI's withholding tax obligation,... in the approximate amount of $900,000, would be satisfied by O&Y, a significant liability... which O&Y has failed to honor. Simply, without these assurances I would not have permitted FEI to continue the Project as it is obvious that neither I, nor my son, would have incurred significant and increasing tax liability nor worked below cost, nor abandoned $700,000 of earned Retention monies when we could have withdrawn from the Project then and there, found other work and thereby avoided at least some of these liabilities and obtained the Retention... (A 288).
>
> [O]&Y's trial Exh. 15 does not include any provision for Retentions... [F]EI earned $700,000 prior to Fall, 1984. O&Y still has the money or is accountable for its misuse. O&Y is *not entitled to any "credit"* for its apparent wrongful choice to use monies rightfully belonging to another. (A 290) (Emphasis added).

Notwithstanding the district court's view that "O&Y has more than made up this deficiency" (A 190), indisputably the November, 1984 - April, 1986, pre-termination advance was for "new work", was performed at O&Y's request and for O&Y's benefit, thus, for O&Y's account. FEI's $700K retainage was

earned during an earlier period, i.e., February, 1983 - November, 1984. (A 237). O&Y's *subsequent* "pre-termination advances" were not documented by O&Y as "payment" for retainage, were not *pled* in a "payment" affirmative defense and may not now be "credited" retrospectively to O&Y's benefit, perhaps grounded upon a district court "balance of the equities" because O&Y lost a $13.5M litigation. More, *O&Y has conceded* that the A and C $700K retentions were neither "credited" to FEI nor part of the now posited "Everything O&Y agreed to pay" theorem.[sic] Convincingly, in O&Y's **Answer and Counterclaims**, to FEI's Third-Party claims, dated July 31, 1986, ("**O&Y's Answer and Counterclaims**"), O&Y included fourteen (14) affirmative defenses, none of which may be identified as a "payment" affirmative defense, rather one as a *concession of non-payment*! In allegation ¶51(a), O&Y admits that the A and C retention amount, $700K, was intended to be tried *separately* as an off-set to O&Y's Ex. 15 damage submission. Definitively, O&Y anticipated in 1986 that the trial simply *could not* be about "what O&Y agreed to pay", but rather that FEI's retention, an "*acknowledged adjustment*", would have to be accounted for, would have to be *returned*, notwithstanding any "advance" in its own interest O&Y might provide:

> 51. As a result of FEI's breaches, O&Y has suffered damages...
>
> > (a) not less than $7.2 million,... representing amounts that O&Y *has paid to FEI* in excess of the contract amounts calculated under the Agreements. It should be noted that *this amount may be reduced at trial to reflect the possible release of retainage, credits and other acknowledged adjustments*.
> >
> > (O&Y's Answer and Counterclaim at ¶51(a)) (Emphasis added).
>
> * * *

Simply, FEI was *not* required to "reserve" an exception to the jury verdict concerning these claims as they had been *severed*

mid-trial at the explicit order of the district court and upon the explicit consent of O&Y. In the conclusive words of the district court:

> THE COURT: ***The matter of the third party claims is really out of the case. I think it would be most confusing to bring that up.***
>
> Let's bring in the jury. Thank you all very much.... (A 140).

It is apparent from the Record, that the March, 1988, severance was of FEI's *claims*, not merely as alleged in FEI's November, 1985, pleadings, but actually as ripe for presentation at the March, 1988, O&Y Trial. At the time of severance, the claims included additional A and C damages in consequence of O&Y's 1984-1986 conduct, i.e., aggravated overhead, tax and retention claims, as well elaborated B and D claims. Definitively, FEI's Third-Party Complaint provided adequate 1985 and continuing notice to O&Y,i.e., FRCP Rule 8 "Notice" pleading, see for example, Third-Party Complaint, ¶¶s 10 and 20. (A 13, 16). Definitively, none of these claims were presented at the O&Y Trial, all had been severed, all had been *ordered* "out of the case".

It is inconceivable that anything other than the prejudicial, deliberate severance of all FEI claims occurred during the O&Y Trial and that now, retrospectively, there has been posited in support of an erroneous dismissal the contention that the jury decided the case upon the theory of "All that O&Y agreed to pay", notwithstanding that no one heard, argued or charged upon such theory, nor was such theory contained in either of two (2) lengthy Opinions or therein remotely referenced.

* * *

Now, as Defendant, Insurance Company of North America, Philadelphia ("**INA**") and its $10.5M bond exposure have been dismissed, O&Y contends differently so as to support another "inconvenient afterthought", (T 3391), the accordion-like expansion of actual issues before the jury - "default" and "damages by reason of such default" (A 313) - to an "All O&Y agreed to pay" proposition, so as to envelop FEI's claims into this new theory, one not contended, indeed, not heard, until years after the jury had been excused.

....The district court instructed the jury concerning the absence of O&Y witnesses, e.g., Farb and Blau (also Alberton, Norris, Gestetner, etc., or any Reichmann), the testimony attributed to them characterized as "admissions", adding concerning Interrogatory No. 3, this essential point:

> [T]he only thing I will say is that there is *Exhibit 15*. (A 104). 15 is a summary of many underlying pieces of evidence, at least it is arguably a summary, and it's up to you *whether it is an accurate summary*, and it is up to you to determine *whether payments and expenses* over and above the contract price *were reasonably incurred. If they weren't incurred or if they were simply extravagant*, they are not reasonably incurred....
>
> (T 3296-97) (Emphasis added).

Also, the court charged concerning witness credibility, adding:

> *You are free to accept all the witness's testimony, reject all or accept part and reject part. That's up to you.* T 3299.

Simply and conclusively, the jury believed FEI witnesses about O&Y assurances and did *not* believe O&Y Exhibit 15's claim for reimbursement of pre-termination expenses. Simply and conclusively, the jury did not "credit" to O&Y reimbursement for expenses which either "weren't incurred" or "were simply extravagant"....

"Simply and conclusively", the jury concluded in their answer to Interrogatory No. 3 that O&Y had incurred *for O&Y's account* all such contended pre-termination expenses, as well, upon waiver, the jury concluded that there was no right to re-imbursement....

POINT III: There Was Substantial Performance, Not Default, By FEI Upon the "A" and "C" Agreements

In Opinion II, the district court stated:

> [U]nder the evidence, the jury could well have found that FEI's financial problems in the *fall of 1984* related to its difficulty in meeting O&Y's *increased demands*, rather than requirements under the original contract, and that *what occurred was an alteration and adjustment* of the contract *rather than a default* by FEI. Of course, the jury found that at some point there was a default by FEI resulting in damages to O&Y of $600,000. The jury was not asked to specify the time of the default, and no party to this action can now complain about the lack of such a specification. It can simply be said that *the jury would have been justified* in finding the *date of default* as being the *time of the termination in April 1986* or some time thereabouts.
>
> * * * (A 317) (Emphasis added).

In April, 1986, O&Y had incurred expenses approximating $22M for the A and C project. Definitively, the jury did not award a "penny" of such "pre-termination expenses" (SA 121), i.e., the $7.8M O&Y advance from the November, 1984, "formal" Adjusted Contract Price amount, $14M, to the April, 1986, *default and termination date* amount, $22M. Thus, the $600K jury damage award - 2.7% of the April, 1986, district court "adjusted" Adjusted Contract Price, $22M - was an insubstantial "default". Definitively, FEI substantially had performed as of April, 1986. Accordingly, O&Y is in breach of the A and C Agreements grounded upon an April, 1986, termination, one wrongfully exercised notwithstanding contemporaneous FEI substantial performance.

Having substantially performed, FEI is entitled to recover... [citations omitted].

It was a condition of O&Y's April, 1986, termination that O&Y have acted in good faith. [Citation omitted].... An owner who terminates the contract upon grounds of material breach must not (i) have breached the agreement, (ii) waived a contractor breach, or (iii) interfered with or prevented the contractor's performance. [Citation omitted].... In all three (3) categories, O&Y has failed. FEI's A and C claims, as severed, may proceed to trial.

POINT IV: O&Y Misrepresentation of the Record.

O&Y misrepresents an otherwise clear record upon this appeal. **First**, the trial presentation of FEI's Ex 317, a November, 1985, Buildings A and C "Recap of payments" (A 23), was preliminary to the severance. Ex 317 and Ex 318 (A 24-39, 370-385), collateral supports for the 1985 damage calculations, upon severance *substantively* were withdrawn from the jury, i.e., were ordered "out of the case". These 1985 exhibits could not have included FEI claims for A and C damages sustained principally November, 1984 - April, 1986; for example, (i) for "overhead" which the Chapter and Verse Submissions established were to be reimbursed through earnings upon the "Buildings B, D and Wintergarden Contracts (A 288), for retentions to be "returned to FEI upon completion of the Project (A 288), and (iii) for a tax obligation to be "satisfied by O&Y... which O&Y... failed to honor...". (A 288). More, O&Y's suggestion for "confusion" (O&Y Br. at 19) is inaccurate; definitively, in March, 1988, in open Court, the district court acknowledged that he had *been corrected*, that FEI's Third Party claims, i.e., *not* merely as stated in a 1985 pleading, but rather as elaborated through March, 1988, fact and circumstance, had been severed. (A135-140). O&Y's appeal contentions concerning FEI Ex's 317 and 318 (O&Y Br. at 18-19), are belied by the record: during jury deliberations, O&Y railed against the jury's possession of these exhibits grounded upon O&Y's contention for the substantive absence of any possible jury reliance, *because* severed:

> MR. SELTZER: This packet of 318A was submitted to the jury by defendants with a whole bunch of other damage exhibits attached to it showing millions of dollars of damage for which there was ***never testimony nor admission*** of the document into evidence.... (A 165).
>
> [T]he cover page which shows what it is will be 318 A in evidence... but A has a damage figure on it for which ***there was never any testimony, never any connection. The witness never got back to it***. And it's ***an amount on which there was nothing in the***

summation, no reference to it, no cross-examination on it.... (A 167).

[I] recall 317 was the enumeration next to which the ***jury made asterisks***, because they were ***not to consider certain items***.

Your Honor, this is such vital material....

THE COURT: I don't think it is vital at all... (A 168) and they were told to ***make asterisks***, and they were ***told that they could not consider this***...

[N]o, Mr. Seltzer. I'll tell you, the start of this exercise, which led into 318, was, of course, 317. They were told to put asterisks by three of the four figures that appear under this little section called Claims. Marble priority change, excess wage, stone repairs. And they were specifically told that those are items that were ***not to be considered by them***. (A 169).

[T]here is nothing they could do with 318 A to damage you. (A 172) (Emphasis added).

* * *

Fourth, FEI's A and C ***retention claim, $700K, was not presented to the jury***: FEI's closing argument (T 3061-3115) presented a summary of the myriad facts, witnesses and documents particularly relevant to an enormous project and a resulting O&Y $13M damage claim for FEI default which had occurred during the period 1982 - 1986, events which resulted in a nearly six (6) week trial and three (3) day jury deliberation. The "retention" reference in closing argument was one of many such "facts" addressed in this chronology. Significantly, O&Y omits the concluding retention reference:

[T]he 700,000 is to be repaid to FEI, retention money, repaid to FEI, the rightful owner, sometime about February of '85, according to the schedule.

What happens in February of '85, however, is

> Olympia & York does not repay FEI. It sues the bonding company and holds onto the money. (T 3108).

Notably, the jury was ***not*** requested by any counsel, nor charged by the court, to "credit" O&Y with ***any*** retention, nor to award any retention amount to FEI - the claim having been "severed". See also:

> [S]implest way for FEI to present the closing argument is to address the witnesses and documents you observed... (T 3061);
>
> [O]&Y's failure to satisfy... obligation to supply the stone. That's what we have asked you to concentrate on. That's what the judge asked earlier in the case. He provided some impetus to move the case with a bit more alacrity, because their are numerous other issues before us, but for the sake of today's and the past few weeks' resolution, it is about stone.... (T 3062);
>
> [I] think it is important to reflect on the documents you have seen throughout this case, I just discussed a great summary of things. (T 3111); and
>
> [F]EI did not default on this contract. FEI stayed with the contract. Olympia & York failed to perform. Olympia & York has no one to blame but themselves for this problem. (T 3115).

Fifth, O&Y's assertion for "no defense" to the Bagnelstown loan, also, is belied by the Record:

> **Bagnelstown Loan**
>
> FEI presents as a defense to the *Bagnelstown loan*, the *defense of payment*. The loan terms authorized satisfaction of the balance payable *from* retention monies... (A 230).
>
> [T]he loan balance was or should have been satisfied from

> the authorized A/C Retention in accordance with the loan conditions... [O]&Y's contention that it was authorized to apply Retention to whatever use O&Y chose is prohibited by the Contract... [w]as at O&Y's own risk. [C]redit to O&Y of FEI Retentions,... authorizes conversion of FEI earnings, unjustly enriching O&Y... (A 231).
>
> Although prepared to present evidence in opposition to the loan claim, *FEI was precluded from presenting any evidence* relating to this issue, the Court ruling... that all further FEI evidence... address issues relating exclusively to stone and priority switches (T 2210, 2223)... [T]his claim remains available for final determination between these parties at the trial of FEI severed... claims.... (Chapter and Verse Submissions, A 232).

Consistently, FEI's defense of payment has been presented, indeed, has been voluminously documented.

Sixth, at the February 13, 1992, conference, the district court initially scheduled a trial of FEI's Third-Party claims for the first two (2) weeks of August, 1992, i.e., August 15-31, 1992. At FEI counsel's request, the court then re-scheduled the trial to/until the last two (2) weeks of August, 1992. Notably, neither O&Y nor the district court responded to FEI's July 28, 1992, letter which confirmed the scheduled trial commencement date. (A 397-98). On December 23, 1992, the district court conceded the scheduling of trial concerning FEI's claims, however, adding:

> [I] finally put it down for trial and *then we had a conference*...., (A 340).

However, notwithstanding this added statement, there did *not* occur any such conference between February 13, 1992, and the August 15, (or 17), 1992, scheduled trial commencement date.

* * *

APPENDIX S - TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 22, 1993

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

OLYMPIA & YORK BATTERY CO., et al.,
Appellants,

- against -

FEI Ltd., JOHN and JEAN FOGARTY,
Respondents.

OLYMPIA & YORK V. INSURANCE COMPANY
OF NORTH AMERICA

Index No. 93-7547

40 Foley Square
New York, N.Y. 10007

December 22, 1993
10:30 a.m.

BEFORE:

HON. RALPH K. WINTER, C.J.,
HON. WILLIAM H. TIMBERS,
HON. JOSEPH M. McLAUGHLIN.

APPEARANCES:

Messrs. KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for appellant Olympia & York Battery Co.
425 Park Avenue
New York, N.y. 10022

BY: ROBERT BERNSTEIN, ESQ.,

DANIEL F. [sic] O'CALLAGHAN, ESQ.
Attorney for respondents
17 Battery Place
New York, N.Y. 10004

***

JUDGE WINTER: We'll hear Olympia & York against FEI.

JUDGE TIMBERS: You're Mr. O'Callaghan?

MR. O'CALLAGHAN: Daniel O'Callaghan for the appellants FEI, Mr. and Mrs. Fogarty. Good morning, your Honors.

JUDGE TIMBERS: Let me ask you something, not to be facetious, you attacked the district judge in the way he handled this case.

MR. O'CALLAGHAN: I can't hear you, your Honor. I'm sorry, I can't hear you.

JUDGE TIMBERS: You, quite properly representing your client, attacked the district judge the way he handled this case. Now, did you hear that?

MR. O'CALLAGHAN: I'm having difficulty, your Honor, I'm sorry. You said there was difficulty with the district court judge, but I couldn't hear the rest of it.

JUDGE TIMBERS: What I want to know, if you can tell me, did Judge Griese do anything right in this case?

MR. O'CALLAGHAN: I think that the trial essentially was fair. I think that his severance of my claims was unfair. And that he has for whatever reason decided not to hear that again. But I think the jury verdict was correct. I think his opinions were fair. I think the trial was fair.

JUDGE McLAUGHLIN: Is it perfectly clear on the record that

your claim was severed?

MR. O'CALLAGHAN: It is clear to me, your Honor, definitively that my claims, FEI's claims, were severed. He said they were out of the case.

JUDGE WINTER: Would you give us the page number in the appendix where the severance occurred pursuant to the order?

MR. O'CALLAGHAN: Yes, your Honor, if you give me a moment.

JUDGE WINTER: I thought that would be at the tip of your tongue.

MR. O'CALLAGHAN: It's in the brief, your Honor.

JUDGE TIMBERS: You have to tell us which volume. You have two big, thick volumes.

MR. O'CALLAGHAN: On page 12 of my brief.

JUDGE TIMBERS: I don't care about your brief. I think you have some other questions. What page of the appendix does it appear in your brief?

MR. O'CALLAGHAN: 138 and 139, your Honor.

JUDGE TIMBERS: Something's wrong with the pagination here. Now that's part of the oral argument before Judge Griese, isn't it?

MR. O'CALLAGHAN: No, your Honor, this is at the trial. At the trial, my client was --

JUDGE TIMBERS: I want to make it very clear. I'm asking where in the appendix that appears. You said 138 and 139.

MR. O'CALLAGHAN: Yes, your Honor. In the appendix, the severance of FEI's claims occurred during the trial.

JUDGE TIMBERS: Read the words that you rely on at 138 and 139. Well, I don't want to waste a lot of time. I don't see what your problem is.

MR. O'CALLAGHAN: Yes, your Honor.

At 138, I indicate to the judge that I have no choice but to ask that the third party claims be severed and tried at a later time.

And he says, the judge says, "You are certainly right in your memory of the transcript and you've shown it to me." And then we went off the record.

And the judge said before we went off the record, "Mr. O'Callaghan made an application to sever the FEI counterclaims. And I say third-party claims, he says third-party claims."

And the judge says, "I conferred with counsel on O&Y's position and they agree," and the judge says, "The application is granted upon consent."

At a later time he stated, the judge did, that the third-party claims were out of the case; that he granted the severance and would give me another trial on my claims. And that never did occur.

And then in November of '88, he directed that I submit what he called chapter and verse submissions analyzing all of my claims, which went back to the pleadings, which went back to the Exhibits 317 and 318, the development of that, and the severance at the trial.

The judge wrote the opinions, in both of the opinions -- well, let me just rephrase this. The judge grounds his dismissal upon what he characterizes as the basic issue as what O&Y agreed to pay.

Now, I submit, your Honor, that there was no argument upon what O&Y agreed to pay. There was no evidence upon what O&Y agreed to pay. There was no charge on what O&Y agreed to pay and there were two opinions, none of which referenced what O&Y agreed to pay. The opinions stated that the essential issue in the case was there a default by FEI and what was the loss and damage sustained by O&Y as a result of that default.

The judge clearly determined that the pre-termination advances by O&Y, not one penny of that was awarded by the jury, but that that was the result -- I had reserved five minutes, your Honor --

that the advances made by O&Y, what we call pre-termination advances were really for O&Y's own account was due to their own mismanagement. Post, post-termination advances, another 6 or $7 million.

The jury awarded $600,000 against that, which is only about 2 to 4 percent of the value of O&Y's entire contract. I submit that establishes substantial performance by my client. I'm entitled to proceed to trial on the A, C, B and D claims, which are millions of dollars.

The key circumstance here is that the verdict was concerning O&Y's claims because O&Y at trial, the judge severed the case at the pages I mentioned. He then directed that all evidence, all argument, all issues in the case, all cross-examination, all be directed to the stone issue and to the shifting and building priority.

The case became a defensive case at that time for FEI. All of our claims were put on the backburner, which is exactly what the judge agreed. And when I rested my case, it was under that understanding, under that direction. There was no Rule 49 allocation here. The claims had been severed and there's never been a trial. I submitted chapter and verse submissions at [sic] [after] trial. I appeared for trial. He directed that a trial occur in August of last year. He directed that. I appeared and prepared for trial. I came to the courtroom and the judge declined to grant the trial.

I reserved a few moments.

JUDGE McLAUGHLIN: The relief that you want is simply a trial on your, what you call, third-party complaint, in fact, your counterclaim, the claim that you have?

MR. O'CALLAGHAN: All my claims, your Honor, are on buildings A, B, C and D and they're quite significant. And A, C is in the millions of dollars and B and D is in the millions of dollars.

JUDGE McLAUGHLIN: That's all you want?

MR. O'CALLAGHAN: For trial.

JUDGE McLAUGHLIN: A trial on those things?

MR. O'CALLAGHAN: But I do have a claim here for judgment as well on the amount of money which Olympia & York really has retained. In fact, I characterized that at trial. Olympia & York contended, not disputed from deposition of a $14 million adjusted contract price and roughly paid FEI $12.5 million, therefore they had withheld $1.5 million.

Now I'll give them credit. I'll give Olympia & York credit for the $700,000 retention, but I submit due and owing now is about $900,000 because they have withheld the money. We worked for it. We earned it on A and C and they say that's the contract price, but they didn't pay it to us.

JUDGE McLAUGHLIN; What's the total amount you want?

MR. O'CALLAGHAN: It's hard, giving Olympia & York credit for the jury verdict and making certain adjustments, it's close to $4 million.

JUDGE TIMBERS: You've asked for a new trial before a different judge, right?

MR. O'CALLAGHAN: I think that would be appropriate in the context of the circumstances of the difficulty experienced during discovery, which was really very one-sided from my perspective, the judge's, I think, lack of interest in the case. He gave it six weeks, he effectively gave it an O&Y trial and not my case.

JUDGE TIMBERS: Well, I'm only speaking for myself, having been a trial judge, there's nothing more undesirable from a trial judge's standpoint than what you see in the last paragraph, the last sentence, "demand [sic] [remand] for trial before a different judge". I always thought you had to have a more substantial other basis for making that request that you're making here. Judge Griese probably made mistakes or errors, but that doesn't mean he's not competent to retry it. You say yourself it's a fair trial.

MR. O'CALLAGHAN: Fair trial.

JUDGE TIMBERS: He presided?

MR. O'CALLAGHAN: I have no doubt the trial was fair. My concern was the judge's lack of interest and the mechanisms by which he facilitated my necessity for taking this appeal. Characterizing the case as everything Olympia & York agreed to pay just was not true, not accurate.

And setting the case for trial back in last August having all that preparation and then when I appeared for trial, he just wasn't going to grant a trial and then six more months and I had to take an appeal while Olympia & York is in bankruptcy all over the world except New York. I think it would be fair before a different judge.

JUDGE TIMBERS: You made your point.

MR. O'CALLAGHAN: Thank you, your Honor.

JUDGE TIMBERS: Let me ask you, Mr. --

MR. BERNSTEIN: Mr. Robert Bernstein for the appellee.

JUDGE TIMBERS: What, if anything, did Judge Griese do right in trying this case?

MR. BERNSTEIN: Your Honor, I too have trouble hearing. What did he do that....

JUDGE McLAUGHLIN: Was right.

MR. BERNSTEIN: That was right?

Well, from Olympia & York's perspective, we had a six-week trial and although the jury found that FEI did default on the contract and although the jury also found that O&Y did not cause that default, the jury only awarded $600,000 in damages, even though it was undisputed that FEI received $7.8 million over and above the agreed upon contract price. And even though we had damage claims of $13.5 million over and above the agreed upon contract price.

Now, you're asking what did Judge Griese do that was right.

JUDGE TIMBERS: You're trying to uphold the decision of the

lower court?

MR. BERNSTEIN: That's right. But let me answer that by saying what we had to do here is we moved for judgment at O&Y and we lost. The judge upheld the decision of the jury by finding, in effect, that the jury had concluded that the agreed upon contract price was $22 million.

So what Judge Griese did that was right was he was consistent. When it came time to deal with FEI's claims, third-party claims, he concluded that they had been, at least on buildings A and C, they had been tried to the jury.

And with the Court's permission,I'd like to show you an exhibit from the third-party complaint, which is in the appendix at A-23. But I've blown it up because I think it will illustrate my point and the dilemma facing Judge Griese.

Your Honors, this is Exhibit 317 in evidence. It was Exhibit 1 to the third-party complaint and what it purports to do, this is FEI's document, and what it purports to do is recap the payments owed on buildings A and C.

Now let me say that the trial did deal solely with buildings A and C. There were four buildings at the World Financial Center. The trial dealt with buildings A and C and the reason for that was that O&Y had claims against a bonding company on buildings A and C.

So while it is true that there was a severance of FEI's claims, what is absolutely clear from this exhibit in that all of FEI's claims on buildings A and C went to the jury.

Let me show you how this exhibit shows that.

JUDGE WINTER: I just don't understand how you could have let that happen. I mean, if the claims are severed, why didn't you object to relevancy?

MR. BERNSTEIN: We did. And the judge felt that this went to the jury. We objected and he said, he allowed it in. He overruled our objection.

We wanted to take an appeal but we felt that when judgment, when the court entered a 54(B) judgment a few years ago on INA's dismissal, what happened in June of '89 was consistent with the judge's determination that the jury must have concluded that the

agreed upon contract price was $22 million.

And let me just illustrate --

JUDGE TIMBERS: Well, the judge made a finding of fact on this, on this severance issue, and the real question for us to decide is whether it was clearly erroneous.

MR. BERNSTEIN: Well, what he was faced with was FEI's total claim on buildings A and C was for --this was a $2 million claim, but it was predicated on a $14 million agreed upon contract price and claims relating to marble, priority change excess wage, stone repairs, which brought the total to $21.5 million.

JUDGE TIMBERS: Leave the figures out.

MR. BERNSTEIN: Sure.

JUDGE TIMBERS: The judge made a finding, if I understand you correctly, that buildings A and C which you're talking about those claims to overhead and tax reimbursement were considered by the jury and incorporated in this verdict.

MR. BERNSTEIN: Yes.

JUDGE TIMBERS: How could that have been?

MR. BERNSTEIN: Very simple. This Exhibit 1 --

JUDGE TIMBERS: In other words, those claims were not further actionable.

MR. BERNSTEIN: That's right. Those claims for excess, for taxes and the overhead, if you look at the third-party complaint which precedes this exhibit in the record, in fact, it's the first document in the appendix.

JUDGE TIMBERS: Stop referring back and forth. A very simple finding that the judge made and you say he was correct?

MR. BERNSTEIN: Yes, he was correct because the issue of

overhead, taxes was part of the third-party complaint that resulted in these claims and to the Exhibit 317 that went to the jury.

The basis for that is that the complaint says that that's the basis for these claims and this is what the jury had.

Now the judge said, "Look, it's clear to me that these claims were not taken out. There in no severance order that says that the claim for taxes, retention, or overhead is out of the case," and what he's looking at is this Exhibit 317, which was --

JUDGE WINTER: Looking at the exhibit, was the jury asked specifically to make separate findings on overhead, retention and taxes?

MR. BERNSTEIN: Not at all.

JUDGE WINTER: So we have irrelevant evidence that went in.

MR. BERNSTEIN: Excuse me?

JUDGE WINTER: So we have irrelevant evidence that went in and there's an assumption that the jury felt it was relevant and rendered a judgment on certain claims it wasn't told about.

MR. BERNSTEIN: Well --

JUDGE TIMBERS: That's what the judge said.

MR. BERNSTEIN: Excuse me? No, I understand. The judge said either these claims for retention, taxes and overhead were within what the jury found by essentially finding an agreed upon contract versus 22 million instead of 14 million, it either was included within the 7.8 or he says I can't, if it wasn't, and I can't tell one way or the other whether it was or it wasn't, then FEI never took it out from the jury's consideration. And in order to take it out from the jury's consideration --

JUDGE WINTER: It's not up to FEI to take something out of the jury's consideration, it's up to the judge.

MR. BERNSTEIN: The judge didn't do it either.

JUDGE TINBERS: Maybe he was clearly wrong. Why don't you admit that?

MR. BERNSTEIN: FEI was clearly erroneous --

JUDGE WINTER: Is it your point that the jury could not have reached the verdict it did without deciding those claims?

MR. BERNSTEIN: Correct.

JUDGE WINTER: There was no evidence to support that verdict other than the claims that Mr. O'Callaghan is now pursuing?

MR. BERNSTEIN: That's correct, your Honor. The reason for that is that it was agreed we thought that the agreed upon contract price, it's undisputed, I should say, was $14 million. It was undisputed that we paid $7.8 million to FEI and we paid an additional $6.5 million to other suppliers to complete the contract.

When the jury found that FEI had defaulted and that O&Y did not cause the default but only awarded $6OO,OOO in damages, we moved to judgment NOV on the ground that there was no disputed issue of fact that O&Y had, in fact, paid FEI at least $7.8 million.

Maybe there are issues as to whether the additional amounts paid to third parties was fair and reasonable, but at least as to the amount paid to FEI, that was clear and undisputed. Excuse me, But the dilemma facing the judge was how can he harmonize this jury verdict. We felt he should not have accepted the jury verdict, but we didn't win. He harmonized it by finding that the jury must have considered the amounts in Exhibit 317. He also looked at testimony that FEI's chairman had made.

JUDGE WINTER: You moved for judgment NOV?

MR. BERNSTEIN: Yes.

JUDGE WINTER: Did you submit papers?

MR. BERNSTEIN: Absolutely.

JUDGE WINTER: And Mr. O'Callaghan submitted papers?

MR. BERNSTEIN: He certainly did.

JUDGE WINTER: Did Mr. O'Callaghan in those papers say that the judgment was valid because it could be rationalized because of overhead, retention and taxes?

MR. BERNSTEIN: Mr. O'Callaghan's position was that the jury verdict was proper and he did not assert, at that time, any claim for overhead, taxes and retention. What he did do --

JUDGE WINTER: I didn't ask that. I asked you whether he justified the verdict and opposed judgment NOV by saying that it probably included overhead, taxes and retention.

MR. BERNSTEIN: No, he did not. He did not assert that position in his paper.

JUDGE WINTER: Why should we assume the district judge took that position?

MR. BERNSTEIN: The district judge here took the position -- I think the district judge took an either/or position. Basically said I can't tell whether it was included. It certainly wasn't taken out. Because there was nothing expressed on the record that took it out and the fact is that the amount that O&Y
agreed to pay was an issue.

JUDGE WINTER: There was nothing expressed in the record that took it out. What do you mean by that?

MR. BERNSTEIN: The judge asked Mr. O'Callaghan repeatedly, "Show me in the record, show me in the transcript, show me where it is that I said that your claim for taxes, retention and overhead was taken out from consideration by the jury."

And all Mr. O'Callaghan said was, "You severed my third-party claims." Well, it's true.

JUDGE WINTER: That's what he's saying here?

MR. BERNSTEIN: That's right.

JUDGE McLAUGHLIN: Isn't that enough to take it out?

MR. BERNSTEIN: The judge felt that in light of the fact that there was evidence submitted on those claims to the jury that those claims are reflected in the third-party complaint and the total amount asked for in the third-party complaint was $21 million of which 19 had already been paid. And the judge felt that the only way to rationalize the jury verdict was to conclude that the agreed upon contract price was $22 million, which was more than FEI was claiming.

JUDGE WINTER: The judgment shouldn't have been granted?

MR. BERNSTEIN: It sure shouldn't have, but we did not appeal.

JUDGE WINTER: Why?

MR. BERNSTEIN: Why didn't we appeal?

JUDGE WINTER: Why couldn't you appeal? When they appealed, why couldn't you have cross-appealed?

MR. BERNSTEIN: We could have. What we have said was that if in our papers, what we said was that if the court were to find, if this court were to find that FEI's claims were severed, then it also follows that the court was wrong on its NOV motion upon which this was predicated.

And that if there is a claim of FEI's that was not heard before the jury, then NOV should be granted and we will try FEI's claims for whatever overage, for whatever amounts it claims as an offset.

JUDGE TIMBERS: The problem is you're faced with a record that shows the judge made a finding that those two items, the tax thing and what's the other one, overhead?

MR. BERNSTEIN: Taxes, overhead and retention.

JUDGE TIMBERS: Were considered by the jury and were incorporated in its verdict.

MR. BERNSTEIN: That's right.

JUDGE TIMBERS: Unless he was clearly wrong, he's still bound by that.

MR. BERNSTEIN: You find, I don't think he was clearly erroneous. There is evidence in the record to support what he's saying. For one thing, Mr. O'Callaghan argued to the jury about the retention claim. And I quote his argument about the retention claim to the jury in my brief.

The other thing in that the taxes and overhead claim --

JUDGE WINTER: What page do you quote that, page 16?

MR. BERNSTEIN: Yes. Page 16, the 700,000 is to be repaid to FBI, retention money repaid to FEI.

So what I submit, your Honor, let me try to suggest what happened here. What happened here is that the court concluded that FEI did extraordinarily well. It was facing claims of $13.5 million by O&Y, it ended up with a jury verdict of 600,000 against it. $7.8 million over and above the contract price was undisputed was paid to FEI, so it was undisputed that they got $22 million.

JUDGE WINTER: I understand all that. But if I understand the procedural posture of this case, we are not allowed to reduce any verdict against you. That's just not before us.

MR. BERNSTEIN: Well, your Honor, I would suspect that if -- I see that my time is up. But if I may answer your question --

JUDGE WINTER: Go ahead.

JUDGE TIMBERS: You saved some rebuttal time. You can use it now.

MR. BERNSTEIN: Did I have some rebuttal time? I didn't think so.

JUDGE WINTER: No.

JUDGE TIMBERS: Excuse me, I had the wrong slip.

MR. BERNSTEIN: What we had argued was if the court finds that FEI's claims were reduced, were severed and not heard by the jury, then the court should reduce, should grant the NOV motion or deem that or that finding upon which FEI's claims are predicated has to also go back to the District Court for instructions to deal with this matter as if FEI's claims had been severed, and we're faced with a payment of $7.8 million.

Otherwise, what we're faced with here is a situation where --

JUDGE WINTER: I think you couldn't have appealed from denial of judgment of the NOV.

MR. BERNSTEIN: There's been no order entered.

JUDGE WINTER: There was no order entered. There was no final judgment at that time?

MR. BERNSTEIN: That's right, there was no final judgment entered.

JUDGE WINTER: At any time?

MR. BERNSTEIN: No final judgment has been entered.

JUDGE TIMBERS: An 54(B) judgment.

MR. BERNSTEIN: The 54(B) judgment entered by the bonding company on behalf of the bonding company.

JUDGE TIMBERS: The court made a finding there was no reason to delay the entry.

MR. BERNSTEIN: Judgment with respect to the bonding

company. What the court did was it said that since the jury must have concluded that it was a $22 million contract and not a $14 million contract.

JUDGE WINTER: That's understood. No final judgment entered between you and FEI?

MR. BERNSTEIN: That's correct. Only a 54(B) only with respect to the dismissal of A and C claims.

JUDGE WINTER: He's appealing only from a finding of fact?

MR. BERNSTEIN: He's appealing from the court's dismissal of his claims with respect to buildings A and C.

And what the court did was grant 54(B) on the dismissal of his claims, third-party claims with respect to buildings A and C.

But what the court also did was deal with his claims for B and D by entering a conditional order of dismissal which was not a ruling on the merits and was not intended to be part of a final judgment.

JUDGE WINTER: What about your $600,000?

MR. BERNSTEIN: It's never been reduced to judgment. We've never collected it and if we were to collect it, we would also have a claim which the judge --

JUDGE WINTER: Why aren't you arguing that he can't appeal?

JUDGE TIMBERS: The judge explained.

MR. BERNSTEIN: The judge expressly gave --

JUDGE TIMBERS: Excuse me for a moment, I have trouble being heard. The judge found -- made a finding in that 54(B) judgment he dismissed the $600,000 claims out of the case.

MR. BERNSTEIN: No, your Honor. What I think he did --

JUDGE TIMBERS: You didn't take an appeal?

MR. BERNSTEIN: What he had done was he entered a conditional dismissal, which was not part of the 54(B), a conditional dismissal of those claims that O&Y has and the reason for that is this: O&Y has claims that have $600,000 from the jury verdict, another $400,000 on an unrepaid loan, which was also severed from the case. So O&Y had claims of a million dollars.

FEI's remaining claims on buildings B and D amounted to approximately $700,000. The judge found conditionally was, "If my ruling affirming the dismissal of the claims on A and C is affirmed, then it is not in the interests of justice and a waste of time."

JUDGE TIMBERS: Put it just the other way around, subject to reinstatement.

MR. BERNSTEIN: Yes.

JUDGE TIMBERS: "If the foregoing judgment is reversed or the claims to which it pertains are remanded as a result of any appeal." That sounds to me like a very conscientious district judge that anticipated the case in some time might have to come back to him.

MR. BERNSTEIN: If it comes back, what he's saying is that O&Y should have every right to raise the offsets that it would have with respect to the 600,000 verdict alone.

JUDGE WINTER: At what point can you appeal the judgment of NOV or could you have appealed it?

MR. BERNSTEIN: We can appeal it whenever a final judgment is entered. We could have asked the judge to enter --

JUDGE WINTER: Isn't the judge's -- I'm now totally confused. Isn't the certification under Rule 54 error because these are not severable claims? You're arguing that that [sic] the judgment, that if we reversed his claims, then when you appeal the judgment NOV, that's got to be reversed.

MR. BERNSTEIN: Well, I didn't brief the issue on whether 54(B) was properly entered.

JUDGE WINTER: Did you agree to it?

MR. BERNSTEIN: Yes. We agreed to it because the judge wanted to -- we had pending before the judge --

JUDGE WINTER: See, you're saying that the third-party claims were dismissed at the time the judge denied the motion for judgment NOV.

MR. BERNSTEIN: We are saying --

JUDGE WINTER: Either that or they were satisfied.

MR. BERNSTEIN: Yes, we're saying they were satisfied at the time the judge denied the motion for NOV, but it wasn't before him. What happened was --

JUDGE WINTER: What wasn't before him?

MR. BERNSTEIN: Let me state it chronologically. The motion for NOV was decided in September of '88.

JUDGE WINTER: And the judge decides in September of '88 that all of the third-party claims --

MR. BERNSTEIN: No. What happened was --

JUDGE WINTER: Maybe I should finish.

MR. BERNSTEIN: Okay.

JUDGE WINTER: The judge decided that the third-party claims were included in the verdict?

MR. BERNSTEIN: He did do that, but he didn't do that in September of '88.

JUDGE WINTER: He did it later.

MR. BERNSTEIN: He did it later. What happens --

JUDGE WINTER: Implicitly, he did it in September.

MR. BERNSTEIN: Arguably, but it wasn't before him. What happened was we made our motion for NOV.

JUDGE WINTER: Why wasn't that before him? Why is it before us and not before him?

MR. BERNSTEIN: Because, if I could just state it chronologically, I think it might clear it up.

JUDGE TIMBERS: Before you do that, may I ask you, since the presiding judge, there's a judge on this court, one of our colleagues, predecessors, he used to say when that red light goes on, out goes the money. Don't you believe in that?

JUDGE WINTER: Unless the presiding judge has questions.

MR. BERNSTEIN: Judge Timbers, with that in mind, let me just say, if the panel has no further questions --

JUDGE WINTER: I do not understand what's going on here.

JUDGE McLAUGHLIN: I don't either.

JUDGE WINTER: Two of us don't understand this. Now without your going into the chronology, let me try and state the confusion.

MR. BERNSTEIN: Sure.

JUDGE WINTER: The burden of your argument, as I understand it, is that the partnership claims, although severed, were, in fact, the basis for the jury verdict.

MR. BERNSTEIN: In fact, with respect to buildings A and C,

correct.

JUDGE McLAUGHLIN: The evidence went in. It was charged to the jury, it was summed up and everything, even though there was a severance.

JUDGE WINTER: It was not charged to the jury?

MR. BERNSTEIN: No, I don't -- with respect to the jury charge, the jury was asked to, in question No. 3 of the special verdict form, the jury was asked to find what was the adjusted contract price and what damages, if any, did O&Y incur over and above the adjusted contract price. And implicit in that question No. 3 has to be a finding by the jury what was the adjusted contract price.

Now we argue that the adjusted contract price was $14 million, but the judge said in order to rationalize this jury verdict, I have to find that the jury concluded it was $22 million. Since that exceeds the amount of whatever FEI was claiming in its third-party complaint, that should be the end of the matter. But it wasn't.

What happened after September of '88 is that the judge said, "Okay, now that I've decided judgment NOV against O&Y, let's turn to these third-party claims of FEI. Mr. O'Callaghan, do you have any third-party claims left? Weren't they all taken care of by the jury verdict?"

The answer was, "Well, yes, but I disagree with your finding that the agreed upon contract price was $22 million. It was really $14 million. So the predicate for my third-party complaint, third-party claims is that the agreed upon contract price was $14 million."

So Judge Griese says, "Well, then, you can't recover, you can't get it twice. The jury effectively gave you $7.8 million, which is more than you are even asking for. So you can't get it twice."

At that point, two months later, Mr. O'Callaghan submitted, that's why he was asked for chapter and verse. Two months later, he said, "Well, my claims were really for $2 million more than the $22 million that the jury found." And the judge said, "Where's that? I don't see that anywhere."

We moved for summary judgment to dismiss those claims.

The matter was briefed. The court never decided. He issued a ruling a year ago in December last year in which he finally ruled on the A and C claims, but the matter was before him since 1988. That's what happened.

JUDGE WINTER: Okay.

MR. BERNSTEIN: Okay.

JUDGE McLAUGHLIN: This is a procedural jungle.

MR. O'CALLAGHAN: I have five minutes, Judge.

JUDGE TIMBERS: It's a morass, a morass.

MR. O'CALLAGHAN: If I may simplify it, to some extent, I addressed in my reply memorandum a final judgment here. O&Y didn't appeal anything. Years ago, I made a motion to dismiss. They didn't appeal that. I'm not certain it's 54. They didn't appeal that. They didn't appeal in this case. The issue now is finally before this court. I have addressed it on my first point in my reply papers.

JUDGE TIMBERS: The issue is what is set forth in the Rule 54. That's what he allowed in interrogatory [sic] appeal. Otherwise --

MR. O'CALLAGHAN: The judge stated, the Rule 54 order was drafted and submitted by Olympia a York. Olympia a York drafted it and submitted it to the court. And the judge signed it and he said in the order, "It is further ordered" -- "further ordered that all remaining claims on the defendants are hereby dismissed with prejudice."

That is my entire case. That's what I appealed upon his final judgment in this case. Olympia & York's judgment against INA was years ago. Olympia & York had a jury verdict and Olympia & York has not appealed anything.

JUDGE WINTER: The judgment has never been entered.

JUDGE TIMBERS: Other than the 54(B).

MR. O'CALLAGHAN: There was a judgment entered in the INA, in INA's dismissal. The judgment upon the jury verdict. I'm not certain that there was an order entered. There were two opinions issued concerning the jury verdict, sustaining the jury's verdict.

JUDGE WINTER: Opinions are nothing, it's judgments that count. Not nothing --

JUDGE TIMBERS: Is there a judgment other than 54(B) that's headed "54(B) Judgment and Order of Conditional Dismissal"? Is there any other judgment?

MR. O'CALLAGHAN: The only other judgment I'm aware of, your Honor, is the INA judgment. That's the only other judgment I recall.

JUDGE WINTER: What was that for?

MR. O'CALLAGHAN: That was a dismissal of INA from the case.

JUDGE WINTER: So there is a final judgment?

MR. O'CALLAGHAN: I submit there's a final judgment concerning my case, your Honor, and Olympia a York did not appeal.

JUDGE WINTER: Concerning your third-party claim?

MR. O'CALLAGHAN: Olympia & York didn't appeal. They didn't appeal.

JUDGE WINTER: According to both of you, there's nothing for them to appeal. That's why I raised the question whether this is properly before us under Rule 54. There's nothing severable about it at all. It's all one issue.

MR. O'CALLAGHAN: I submit it is properly before you, your Honor. It's only my case that now exists in this situation.

JUDGE TIMBERS: We're not necessarily -- Judge Winter is entirely correct. We're not bound by Rule 54(B) certificate. We can find it was improvidently granted and there are cases in this court that have so held.

JUDGE WINTER: Did the judge find that the jury verdict included the claims you are now asserting?

MR. O'CALLAGHAN: Yes, your Honor. That's what he said the summer of 1990 --

JUDGE WINTER: Is it your claim in the case that your claims are really not at this point in the litigation severable from any appeal from the jury verdict?

MR. O'CALLAGHAN: I don't know how to answer that question. I can only say the judge severed my claims at the trial. His conclusion that the verdict must have encompassed it, I say, is clear error. I can't answer your question any other way.

JUDGE WINTER: It may be error, but shouldn't we await the hearing of your opinion until we get the appeal from the denial of motion for judgment NOV?

MR. O'CALLAGHAN: I would like to address that if I may,, your Honor, in my own memorandum submitted after this. I don't agree I can address that this morning because I'm not prepared to address it. He hasn't raised any appeal issue at all.

JUDGE WINTER: We have to, subject matter jurisdiction, we have to raise it. I think it would be helpful if both of you would address all of these issues as to appealability in a letter to be delivered to the Clerk's office no later than a week from today.

JUDGE TIMBERS: New Year's Eve.

JUDGE WINTER: A week from tomorrow is New Year's Eve.

JUDGE TIMBERS: Christmas Eve.

MR. O'CALLAGHAN: Might I just ask for a few days later. I have some other matters to attend to.

JUDGE WINTER: January 4th.

MR. O'CALLAGHAN: 317 is not a submission of FEI's claims. It's a recap of payments in an industry between a contractor and subcontractor. Some recaps, this doesn't include the overhead. It doesn't include the taxes. It wasn't intended to do that.

On the issue of 317 and 318 being before the jury, you're correct, they were irrelevant. In fact, Olympia & York objected strenuously before the jury came in with a verdict that the jury had 317 and 318. And I address it in my memorandum, pages 15 and 16.

Counsel for Kaye, Scholer vehemently objected to the jury having that, saying and the reason why they objected was because it has a damage figure on it, because a damage figure on it for which there was never any testimony, never any connection. The witness never got back to it and it's an amount on which there was nothing in the summation, no reference to it, no cross-examination.

And the reason all that is true, of course, your Honor, is because it had been severed. Olympia & York was concerned that the jury would actually consider my claims and they were very adamantly trying to tell Judge Griese the jury doesn't have that claim, it's been severed. And the judge said exactly that's true [sic]. On the point of the retention being argued to the jury.

There was summation of the facts that I made to the jury starting back in 1982 in the World Financial Center, I covered every fact I could have possibly covered. There was no argument to the jury to give me any retention because it had been severed.

JUDGE WINTER: You understand about these letters. If he has a judgment he could appeal from, he, Mr. O'Callaghan, should let us know about that. We want detail of all of the judgments that have been entered, what is appealable and whether the Rule 54 certification was improvidently granted.

MR. O'CALLAGHAN: Yes, your Honor.

JUDGE TIMBERS: I assume we're entitled to post-summation briefs simultaneously?

JUDGE WINTER: They should go to the Clerk's office January 4th.

Thank you both.

APPENDIX T - LETTER OF COUNSEL FOR FEI, LTD. ET AL. TO CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 4, 1994

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
17 BATTERY PLACE
NEW YORK, N.Y. 10004
212-222-4200

TELECOPIER: 212-222-4205

January 4, 1994

Elaine B. Goldsmith, Esq.
Clerk of the Court
Court of Appeals for the Second Circuit
40 Foley Square
Room 1702
New York, NY 10007

Re: O&Y v. INA v. FEI Ltd, et al.
C.A. No. 93-7547

Dear Ms. Goldsmith,

This letter is submitted at the request of the Court pursuant to instruction at the December 20, 1993, oral argument.

There have been two (2) judgments entered in the action:

(i) Final Judgment as to Defendant Insurance Company of North America ("**INA**"), dated September 24, 1991 (the "**INA Judgment**"), (A 321-22); and

(ii) Rule 54(b) Judgment and Order of Conditional

Dismissal, dated May 4, 1993 (the "**Rule 54(b) Judgment**"). (A 415-16).

Respectfully., it is apparent from the Record that the INA Judgment was rendered in consequence of the Court's two (2) Opinions (those dated September 18, 1988 (A 176-92) and June 2, 1989 (A 311-20), *both* of which denied O&Y's June 17, 1988, motion for JNOV, including re-argument of the JNOV motion (A 176, 312). The INA Judgment dismissed O&Y's complaint against INA grounded upon "material alteration" of the INA bond (A 319a). Nonetheless, the dismissal incorporated and was grounded upon the identical operative facts - as stated - in the two Opinions (A 319-20) which repeatedly denied O&Y's JNOV motion. Since September, 1991, O&Y has not sought any appeal of this judgment, pursuant to Rule 54(b) or otherwise, notwithstanding the Court's inclusion in the INA Judgment of the direction:

> "further ordering that there is *no just reason for delay in the entry* of such *final judgment* ...
> (A 322). (Emphasis added).

Similarly, in the Rule 54(b) Judgment - a document drafted and submitted by O&Y - the Court determined that:

> (i) certain FEI claims (overhead, $900K and tax reimbursement $IM) are *final, severable, and appealable*;
>
> (ii) *any* further litigation of *all* remaining claims is *futile*;
>
> (iii) O&Y's claims, upon the verdict ($600K) and upon a loan ($450K), with O&Y's consent were *dismissed* with prejudice;
>
> (iv) *all* other FEI remaining claims were *dismissed* with prejudice.

Again, O&Y did *not* seek any appeal from the second

judgment. Definitively, both in the Rule 54(b) Judgment and in the Court's April 3, 1993, conference direction, the Court clearly declared his intent to conclude the litigation of the *set-off claims* extant between FEI and O&Y:

> It is, in my view, a gross waste of everybody's effort to continue litigating ... As far as the district court proceeding is concerned, it should be over with now, regardless of whether FEI consents or not. There is no utility in having a trial or a legal argument or anything further in the District court... (SA 169-70).
>
> [O]&Y has this claim, FEI has their claims, the only possible effect would be to have a judgment in favor of O&Y... and the Court is ordering dismissal of [O&Y's claims] and, necessarily, a dismissal of FEI's *setoffs*, whatever they are." (SA 171) (Emphasis added).

Respectfully, this appeal upon the Rule 54(b) Judgment is appropriately before this Court upon sufficient jurisdiction. Recently, in *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1095 (2d Cir. 1992), this Court directed that:

> The proper guiding star, as the Supreme Court has emphasized, is "the interest of sound judicial administration [citations omitted]". ... [s]ound judicial administration must involve a proper regard for the duties of both the district court and the appellate court. We should avoid the possibility that the ultimate dispositions of the claims remaining in the district court could either moot our decision on the appealed claim or require us to decide issues twice.

The Court observed that the liberal rules of joinder as well as complex issues and protracted litigation "cry out for flexibility in granting partial final judgments under Rule 54(b)", *Ginett*, at 1095. Indisputably, not just *one* claim but *all* of FEI's claims,

were "finally decided" and there has been an express determination of "no just reason for delay". *Ginett*, at 1091. More, the Court noted that there is *not* any possibility for a mooting of this appeal or concern for decision upon issues twice:

> "If the matter was re-opened, it would only be re-opened as to things that the Court of Appeals remanded and *things that we never have tried* in the district court. So it is not a rehash."
> (SA 172) (Emphasis added).

Definitively, as observed by the Court, the FEI claims presented upon this appeal, are "extricable from one another"; accordingly, the court's discretionary judgment is to be given

> "substantial deference for that court is the one most likely to be familiar with the case and with any justifiable reasons for delay." *Id.* (quoting *Sears, Roebuck*, 351 U.S. at 437, 76 S.Ct. at 900)."

Respectfully, in this 1985, numerous claim, complex action involving a four (4) building dispute concerning construction of the World Financial Center, a dispute in which FEI's claims, indisputably were severed at a March, 1988, trial, indisputably were scheduled for an August, 1992, trial, indisputably were subject to a canceled trial, without notice, then were dismissed six (6) months later, resulting in this appeal into 1994, there is every reason to hear the appeal and enter an order reversing and remanding for a prompt trial of FEI's claims.

Respectfully,

S/Daniel J. O'Callaghan

DJOC: wr
cc : Robert B. Bernstein, Esq. (by mail)

APPENDIX U - LETTER FROM COUNSEL FOR O&Y TO CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 4, 1994

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE
NEW YORK, N.Y. 10022-3598
(212) 836-8000
* * *
[Addresses, etc. for other offices omitted]

BY HAND

Clerk of the Court
United States Court of Appeals
For the Second Circuit
40 Foley Square
New York, New York

Re: Olympia & York Battery Park Co., et al. v. Insurance Company of North America, Philadelphia v. FEI, Ltd., et al., No. 93-7547

Dear Sir:

We represent plaintiffs-appellees Olympia & York Battery Park Company, O&Y (U.S.) Development Corp., Olympia & York Tower B Company, and Olympia & York Tower D Company (collectively, "O&Y") in this matter. At oral argument in this appeal on December 23, 1993, Judge Winter directed the parties to supply the Clerk of the Court with a letter addressing whether the district court's entry of judgment pursuant to Federal Rule of Civil Procedure 54(b) was providently granted. We were also directed to attach copies of all judgments that had been entered in the case.

As shown below, the Rule 54(b) judgment entered May 5,

1993 dismissing FEI's Building A and C claims was providently granted because it fully and finally disposed of distinct and separable claims, *i.e.*, *all* claims of O&Y and FEI with respect to Buildings A and C at the World Financial Center, and that judgment presents no likelihood of duplicative appeals.

A total of two judgments have been entered in this case, both pursuant to Rule 54(b). The first, entered October 1, 1991, dismissed all of O&Y's claims against the Insurance Company of North America. That judgment is attached as Exhibit A. No appeal was taken. The second, entered May 5, 1993, and the subject of this appeal, dismissed all claims of FEI and O&Y with respect to Buildings A and C at the World Financial Center. That judgment is attached as Exhibit B.

FEI's claims with respect to Buildings A and C were set forth in FEI's Third Party Complaint; O&Y's corresponding claims against FEI were set forth in counterclaims pleaded in O&Y's Answer to FEI's Third Party Complaint, dated July 31, 1986, pp. 11-16. This pleading is attached as Exhibit C.

The district court's May 5, 1993 judgment not only dismissed FEI's third-party claims against O&Y with respect to Buildings A and C, but it also dismissed O&Y's third-party claims against FEI with respect to these same two buildings, including the $600,000 jury verdict in O&Y's favor. It therefore follows that, no matter how meritorious its appeal might have been, O&Y did not appeal from the district court's denial of O&Y's motion for judgment notwithstanding the verdict in September, 1988, and any such appeal from that ruling would now be time-barred.

One reason for confusion at oral argument on this issue is that we erred when we said that one reason O&Y did not appeal from the j.n.o.v. ruling was that no final judgment had been entered. In fact, final judgment under Rule 54(b) had been entered for purposes of that appeal not once, but twice.

A second reason for confusion is that the district court's order makes O&Y's claims against FEI, including the $600,000 jury verdict, expressly subject to reinstatement if the dismissal of

FEI's claims with respect to Buildings A and C is reversed by this Court. Thus, it is theoretically possible that, if the dismissal of FEI's A and C claims is reversed, and O&Y's A and C claims are reinstated, and final judgment is subsequently entered on these claims, O&Y could conceivably have another opportunity to appeal from the denial of the j.n.o.v. motion.

However, this Court has already held that the "contingent possibility" of such an appeal should not "operate as a mechanical bar forbidding entry of a 54(b) judgment." *See State of New York v. Amro Realty Corp.*, 936 F.2d 1420, 1424-25 (2d Cir. 1991). Thus, the possibility that O&Y's A and C claims could be reinstated should not ipso facto make the issuance of the Rule 54(b) judgment improper.

In *Amro*, the district court entered a Rule 54(b) judgment which "completely and finally disposed" of third party claims brought against four insurance companies by defendants in a CERCLA action. 936 F.2d at 1424. One of the insurers argued that the judgment was improvidently granted because the same claims against the insurers would inevitably be brought in a second CERCLA action which had been consolidated with the first. Thus, the insurer argued that the same dispute "will necessarily be back again to this court after the district court has made a ruling in the consolidated case.... *Id.* at 1425. However, the court of appeals held that the Rule 54(b) judgment was providently granted and concluded that the district court was "within its discretion in concluding that the benefits of an immediate appeal outweighed the loss of judicial efficiency which might ensue if this appeal were to be followed by another one involving the same parties...." Furthermore, *Amro* pointed out that, as noted by the Supreme Court,

> "[E]ven where 'the district court conclude[s] that there [is] a possibility that an appellate court would have to face the same issue on a subsequent appeal, this might perhaps be offset by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims.'"

Id. at 1426, citing *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 and n.2 (1980). Here, the district court made clear that a Rule 54(b) judgment would "facilitate a settlement of the remainder of the claims," *i.e.*, those with respect to Buildings B and D. Thus, the order provides that, if its dismissal of FEI's claims with respect to Buildings A and C is affirmed, then the entire litigation would be at an end because, in order to settle the matter, O&Y has given up its remaining claims against FEI, which exceed the total dollar amount of FEI's claims with respect to Buildings B and D, and, under those circumstances, any trial of FEI's B and D claims would be a waste of judicial resources.

It is also clear that the A and C claims are distinct and separable from the parties' respective B and D claims. Claims are normally regarded as "separable" if they "involve at least some different questions of fact and law and could be separately enforced." *Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *see also Gottesman v. General Motors Corp.*, 401 F.2d 510, 512 (2d Cir. 1968) (finding separable claims where "different sets of operative facts will determine the result"). Here, the parties' respective claims with respect to Buildings B and D do involve different sets of operative facts, exhibits and proof. Thus, the B and D claims involve different work, different contracts, different buildings and different theories of recovery. The A and C claims are based on FEI's alleged financial default and resulting failure to perform for the agreed upon contract price. The B and D claims are based on FEI's claims for damages following O&Y's termination of contracts it had with FEI for work on those two buildings.

In short, the district court properly certified the May 5, 1993 judgment as final pursuant to Fed. R. Civ. P. 54(b), and this Court can thus decide whether, even though FEI's Third Party Claims were severed at the trial, the district court properly dismissed FEI's third party claims with respect to Buildings A and C.

As shown in our brief and at oral argument, the record at trial shows that FEI did present its claims to the jury with respect to Buildings A and C. Thus, FEI submitted to the jury a

tabulation of its entire claim with respect to Buildings A an C, which was marked into evidence as Exhibit 317 and which was also Exhibit 1 to FEI's Third Party Complaint.[27] The record shows that FEI *did* argue these claims to the jury. Thus, for example, in his closing to the jury, FEI's counsel expressly referred to the $700,000 claim for retention which FEI now claims was severed. Furthermore, based on the September, 1988 j.n.o.v. ruling, the jury had to have both considered and found for FEI on all of its Third Party Claims with respect to Buildings A and C because the jury found that O&Y agreed to pay FEI a total of $22 million, which exceeds the $21 million figure set forth in Exhibit 317 as the sum total of its A and C claims.

In sum, there is ample evidence to show that, with respect to Buildings A and C, FEI's Third Party Claims *were* tried to the jury, even though these claims had been nominally severed from the trial.

Respectfully submitted,

S/Robert B. Bernstein
Robert B. Bernstein

cc: Daniel J. O'Callaghan, Esq.,
Counsel for Defendants-Appellants

---

[27]As FEI's counsel pointed out at oral argument, Exhibit 317 went to the jury over O&Y's strong objection. The only conceivable basis we can think of for admitting Exhibit 317 into evidence is on the issue of what O&Y agreed to pay FEI, which is what the district court determined the jury was asked to decide. *See* December 23, 1992 hearing transcript at A 333. However, if, as FEI contends, the issue of what O&Y agreed to pay FEI was *not* before the jury, then the admission of Exhibit 317 into evidence was clearly erroneous, and highly prejudicial.

APPENDIX V - MOTION BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO EXPEDITE DECISION DATED SEPTEMBER 14, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK

-v-

INSURANCE CO OF
NA

93-7547

NOTICE OF MOTION ...
TO EXPEDITE DECISION

MOTION BY: OPPOSING COUNSEL:

Daniel J. O'Callaghan, Esq.... Robert B. Bernstein, Esq....

* * *

Has argument date of appeal been set: ...
Argument heard 12/22/93

* * *

Brief statement of the relief requested:

An order and/or decision upon the appeal, together with full and complete protection of FEI's ability to obtain collection in full notwithstanding O&Y bankruptcy.

* * *

By:

S/ Daniel J. O'Callaghan 9/14/94

---------- **ORDER** ----------

IT IS HEREBY ORDERED that
the motion be and it hereby is granted denied

_____

RECEIVED

94 SEP 15 AM11:29
U.S. COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,
Plaintiffs-Appellees,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

-against-

FEI LTD., JOHN J. FOGARTY and JEAN FOGARTY,
Third-Party Defendants-Appellants.

C.A. No. 93-7547

AFFIRMATION IN SUPPORT OF FEI'S MOTION TO EXPEDITE DECISION

I, DANIEL J. O'CALLAGHAN, attorney on behalf of Third-Party Defendants-Appellants, FEI, Ltd., John J. Fogarty and Jean Fogarty (collectively, "**FEI**"), do affirm under penalty of perjury that:

1. I submit this affirmation in support of FEI's Motion to Expedite Decision. Oral argument of this appeal was heard on December 22, 1993. Thereafter, pursuant to the Court's request, on January 4, 1994, supplemental letters from counsel for the parties were filed with the Court. However, through today, a decision has not been rendered upon this appeal.

2. This appeal concerns a March-April, *1988*, severance by the District Court of FEI's approximately $5 million in claims against Olympia & York ("**O&Y**") relating to a construction

dispute concerning the World Financial Center project. On February 11, 1992, the District Court directed a two-week August, 1992, trial of FEI's claims. FEI prepared for trial and appeared at the scheduled date and time but was advised by the District Court that a trial had not been scheduled. On December 23, 1992, the District Court directed a dismissal of FEI's claims. By judgment and order entered May 5, 1993, the District Court disposed of all claims with respect to all parties. An appeal to the United States Court of Appeals for the Second Circuit was filed on June 1, 1993.

3. At the December 22, 1993, oral argument, FEI requested a prompt disposition of the appeal, particularly in context of well-known financial difficulties of O&Y worldwide, including significant bankruptcy proceedings in Canada and the United Kingdom. In consequence of the absence of decision through June, 1994, FEI wrote to this Court by letter dated June 24, 1994, requesting advices concerning the status of the appeal. FEI did not receive any response to this correspondence. (Copy of FEI June 24, 1994, letter annexed as "**Ex A**").

4. Today, your affirmant reviewed a copy of the September 12-18, 1994, *Crain's New York Business*, Vol. X, No. 37 ("***Crain's***"), which reports in a front page headline: "Bankruptcy feared at O&Y; Canada, U.S. creditor showdown may mean Ch. 11". Thereafter, *Crain's* reports that proceedings are scheduled to be heard by Federal Bankruptcy Judge James L. Garrity, Jr. on Friday, September 16, 1994, relating to the potential bankruptcy of O&Y in the United States (New York). (Copy of referenced *Crain's* front-page report annexed as "**Ex B**").

5. In consequence of the continuing prejudice sustained by FEI since the 1988 severance, the non-occurrence of the scheduled August, 1992, trial, and the delay in disposition of this appeal, FEI requests that the Court grant the following relief: (i) expedite issuance of a decision upon this appeal and (ii) provide in such decision, or otherwise, for the full and complete protection of FEI's ability to obtain collection in full upon any judgment obtained against O&Y upon any or all of FEI's claims, notwithstanding any bankruptcy proceeding which may be commenced concerning O&Y in the United States.

6. Accordingly, FEI requests that this motion to expedite decision, together with all other relief requested herein, be granted, and that the Court grant such other and further relief as the Court deems just and proper upon this appeal.

Dated: New York, New York
September 14, 1994

S/
Daniel J. O'Callaghan

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
17 BATTERY PLACE
NEW YORK, N.Y. 10004

212-222-4200

TELECOPIER: 212-222-4205

June 24, 1994

BY HAND
Clerk of the Court
Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: O&Y v. INA v. FEI Ltd., et al.
C.A. No. 93-7547

Dear Clerk,

As counsel for Appellants FEI, Ltd., John J. Fogarty and Jean Fogarty, I write to the Court concerning this matter. This appeal addresses the District Court's 1988 severance for subsequent trial of Appellants' claims. Oral argument upon the appeal was heard on December 22, 1993. It is well known and quite understandable that the Court has a full schedule and addresses many matters of great importance. Is there any information that I may provide to Appellants concerning the status of this appeal? Is there any further assistance that Appellants may provide to the Court?

Respectfully,

Daniel J. O'Callaghan

DJOC: wr
cc: FEI, Ltd.
Robert B. Bernstein, Esq.
Counsel for Plaintiffs-Appellees

Exhibit A

CRAIN'S NEW YORK BUSINESS
SEPTEMBER 12-18, 1994
* * *
VOL. X, NO. 37

Bankruptcy feared at O&Y

Canada, U.S. creditor showdown may mean Ch. 11
BY PETER GRANT
CRAIN'S NEW YORK BUSINESS
* * *

The struggle over Olympia & York's U.S. subsidiary heads for a showdown this week with the possibility of bankruptcy more likely than at any other point in the company's two-year-old restructuring effort.

A court hearing is scheduled Sept. 16 to decide whether the administrator of the company's Canadian parent can fire two members of the U.S. board of directors. If he can't fire them, the creditors of the parent company who control the administrator threaten to force O&Y into bankruptcy. If he can, the creditors of the U.S. company that support the directors may push for bankruptcy.

The makeup of the board is critical because after two years of restructuring secured loans, the nine-member body is beginning to decide how to carve up Olympia & York's equity. That has pitted the so-called Canadian creditors -- who currently control 80% of the equity -- against Citibank and Apollo Real Estate Investments, who own the majority of the unsecured claims against the company.

Both sides continued negotiating last week, well aware that a bankruptcy filing would hurt everyone. But battle lines were hardening. "A confrontation has been forced, " says one individual close to the Canadian creditors. "Now things could melt down very quickly."

A Chapter 11 filing would be disastrous for Olympia & York, the city's largest office building owner. Ever since its Canadian parent was taken over by creditors in 1992, management of the U.S. company has been struggling to maintain O&Y as a viable business. Secured creditors, who until now have gone along with this strategy would likely press for a return of their collateral

in a bankruptcy proceeding.

Exhibit B

That would be a nightmare scenario for the city's real estate industry, which is struggling to emerge from one of the worst downturns of the century. A drawn out bankruptcy proceeding would discourage lenders from returning to the Manhattan market. Continued uncertainty over who will ultimately own such trophy assets as 1290 Sixth Ave, 245 Park Ave. and the World Financial Center would undercut the fledgling recovery in the leasing market....

Arguments on the attempt to oust board members Richard Shinn and Willard Butcher are scheduled to be heard by Federal Bankruptcy Judge James L. Garrity Jr., who has been overseeing the Olympia & York case since its Canadian parent filed for bankruptcy protection in the United States and Canada in 1992. Attorneys expect he will make a decision within a few days.

Until now, creditors of the Canadian company have had the most to lose from a bankruptcy filing. They still are owed a staggering $4 billion by the parent company whose most valuable asset is its U.S. arm. But they only control the equity in the U.S. subsidiary through Coopers & Lybrand, the administrator of the Canadian company. As such, their equity claim ranks behind institutions holding mortgages on U.S. properties and insecure creditors holding more than $750 million in debt.

But during the restructuring, the Canadian creditors and Coopers & Lybrand have been outmaneuvered by Apollo and Citibank, one of the largest U.S. unsecured creditors. By strategically buying blocks of unsecured debt and then joining forces, the investment fund and bank have positioned themselves to argue that they, not the Canadian creditors, are the rightful owners of the company.

Groups could not agree

The two largest Canadian creditors -- Canadian Imperial Bank of Commerce and Hong Kong & Shanghai Banking Corp. -- tried to convince their group to join together to buy unsecured debt. But the institutions could never agree on a strategy, which would have meant investing more money into O&Y....

Chapter 11 may be inevitable

Sources say the Canadian creditors have indicated they will have "no choice" but to force a bankruptcy action if Messrs. Shinn and Butcher remain on the board. They probably could not file a voluntary Chapter 11 petition. But they could launch an involuntary bankruptcy by obtaining the support of three creditors.

Individuals close to the Canadian group believe this will not be a problem....

Legal experts predict that Judge Garrity will rule against the Canadian creditors. They note that Olympia & York's U.S. operation was re-incorporated with a new board of directors last year following a power struggle between the Canadian creditors and Citibank that was arbitrated by former Secretary of State Cyrus R. Vance....

UNITED STATE COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

GEORGE LANGE III
Clerk

Date: September 15, 1994

Re: Olympia & York v. Insurance Co of NA

Docket No: 93-7547

We Cannot accept the enclosed motion for filing the following reason(s):

* * *

(X) Other SEE: SUMMARY ORDER filed on 9/15/94 AFFIRMING D.C. decision

Very truly yours,

GEORGE LANGE III, Clerk
By: Angela Martin

S/Angela Martin
Deputy Clerk, USCA

Enclosure(s)

Exhibit C

APPENDIX W - MOTION BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT RELATING TO EN BANC REHEARING DATED SEPTEMBER 21, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK

-v-

INSURANCE CO OF
NA

93-7547

NOTICE OF MOTION ...
RELATING TO EN BANC REHEARING

MOTION BY: OPPOSING COUNSEL:

Daniel J. O'Callaghan, Esq.... Robert B. Bernstein, Esq....

* * *

Has argument date of appeal been set: ...

Decision dated 9/15/94

* * *

Brief statement of the relief requested:

(1) An order granting additional time and pages concerning a Petition for rehearing, together with the addition of exhibits and (2) statements relating to the 9/15/94 Summary Order.

* * *

By:

S/ Daniel J. O'Callaghan 9/21/94

---------- ORDER ----------

IT IS HEREBY ORDERED that
the motion be and it hereby is granted denied

_____

RECEIVED

SEP 21 1994
U.S. COURT OF APPEALS
2ND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,
Plaintiffs-Appellees,
-against-
INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,
-against-
FEI LTD., JOHN J. FOGARTY and JEAN FOGARTY,
Third-Party Defendants-Appellants.

C.A. No. 93-7547

AFFIRMATION IN SUPPORT OF FEI'S MOTION RELATING TO EN BANC REHEARING

I, DANIEL J. O'CALLAGHAN, attorney on behalf of Third-Party Defendants-Appellants, FEI, Ltd., John J. Fogarty and Jean Fogarty (collectively, "**FEI**"), do affirm under penalty of perjury that:

1. I submit this affirmation in support of FEI's Motion Relating to En Banc Rehearing. On September 15, 1994, at 11:29 a.m., Affirmant filed in the United States Court of Appeals for the Second Circuit a "**Motion to Expedite Decision**", grounded upon the publicly reported imminence of bankruptcy of Appellee, Olympia & York ("**O&Y**"). At the occasion of this filing, Affirmant was not advised of any decision already having been rendered upon this appeal, rather, the Motion to Expedite Decision was accepted for filing. (Copy of Motion to Expedite Decision, dated September 15, 1994, is annexed as "**Exhibit C**").

2. Subsequently, on September 15, 1994, at 3:30 p.m., this Court's Clerk's office telephoned Affirmant's office to advise that a decision upon this appeal had been rendered in a Summary Order affirming the District Court's dismissal of nearly $5 million of FEI

claims (or counterclaims) against O&Y, notwithstanding severance of such claims at a 1988 trial (the "**Summary Order**").

3. On September 19, 1994, Affirmant received by mail from this Court's Clerk's office a copy of the Summary Order filed September 15, 1994, together with return of the Motion to Expedite Decision, grounded upon prior issuance of the Summary Order.

4. In addition to the Summary Order's substantive affirmance, there is notable about the Summary Order at least the following: (i) the stated recusal of Judge William H. Timbers, absent stated grounds or date of recusal, (ii) the absence of signature by Judge Joseph M. McLaughlin, rather, such signature "per RKW",[28] (iii) an affirmance solely grounded upon the District Court December 23, 1992, conference directions, nonetheless, absent any statement which addresses the delay in issuance of such affirmance in context of the oral argument heard December 22, 1993, (the "**Oral Argument**") and (iv) in context of the nearly ten (10)-month period elapsed since the Oral Argument, notwithstanding an appeal upon limited appendices, briefs, and legal issues - indeed, upon one legal issue, a trial-transcript-recorded severance - and (v) in context of the continuing publicly reported imminence of an O&Y bankruptcy. (Copy of Summary Order, dated September 15, 1994, annexed as "**Exhibit D**".)

5. The Oral Argument encompassed forty-five (45) minutes and was transcribed into forty-three (43) pages of text. Respectfully, it is submitted that any fair review of the transcript of this argument reveals the absence of all support upon any grounds for the District Court's dismissal, rather, only indication of some concern for O&Y's failure to cross-appeal and relating to the validity of O&Y's R. 54(b) jurisdictional challenge. Definitively, all R. 54(b) issue was resolved in favor of this Court's jurisdiction upon compliance with the Court's direction for counsels' letters, filed on January 4, 1994, confirming finality of judgments issued. Thereafter, through issuance of the Summary Order on September 15, 1994, FEI continued to sustain prejudice

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[28]Affirmant does not dispute Judge McLaughlin's participation in the Summary Order, but requests a statement relating to the timing of issuance.

upon the delay in resolution of the appeal, manifestly in consequence of the financial difficulties, indeed, continuing reports of imminent O&Y bankruptcy.

6. In context of the record in these proceedings since 1985, the content and timing of the Summary Order, the continuing prejudice to FEI upon the delay in resolution of the severed claims since 1988 and the continuing prejudice imposed upon FEI in consequence of anticipated post-Summary Order proceedings now necessitated prior to any relief to FEI, e.g., **en banc** rehearing and/or other proceedings - all in context of the continuing imminence of an O&Y bankruptcy - the following relief is requested: (i) statement of the grounds and date of the recusal of Judge William H. Timbers; (ii) statement of the grounds for the nearly ten (10)-month delay in issuance of the Summary Order and the timing of issuance in context of said delay and publicly reported September 16, 1994, bankruptcy proceedings relating to O&Y; (iii) the grant of an extension of time for the service and filing of a Petition for Rehearing En Banc (a "**Petition**"), i.e., to and until October 17, 1994; (iv) the grant of permission to serve and file a Petition of no more than thirty (30) pages in length; (v) the grant of permission to serve and file as exhibits to the Petition a copy of (a) the District Court's Opinion dated September 19, 1988, (b) the District Court's Opinion dated June 2, 1989, (c) the District Court's December 23, 1992 conference dismissal directions, (d) the District Court's April 3, 1993, conference dismissal directions, and (e) a copy of the transcript of the Oral Argument herein held December 23, 1993.

Dated: New York, New York
September 21, 1994

S/

Daniel J. O'Callaghan, Esq.
Attorney for Third-Party
Defendants-Appellants
FEI LTD, JOHN J. FOGARTY
and **JEAN FOGARTY**
17 Battery Place
New York, New York 10004
(212) 222-4200

APPENDIX X - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING MOTION RELATING TO EN BANC REHEARING *UNDATED*; DOCKETED OCTOBER 11, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK	SEAL: UNITED STATES COURT
-*v*-	OF APPEALS [**MOTION**] FILED
INSURANCE CO OF NA	SEP 21 1994 GEORGE LANGE III, CLERK

93-7547

NOTICE OF MOTION ...
RELATING TO EN BANC REHEARING

MOTION BY:	OPPOSING COUNSEL:
Daniel J. O'Callaghan, Esq....	Robert B. Bernstein, Esq....

* * *

Has argument date of appeal been set: ...

Decision dated 9/15/94

* * *

Brief statement of the relief requested:

(1) An order granting additional time and pages concerning a Petition for rehearing, together with the addition of exhibits and (2) statements relating to the 9/15/94 Summary Order.

* * *

By:

S/ Daniel J. O'Callaghan 9/21/94

---------- **ORDER** ----------

IT IS HEREBY ORDERED that
the motion be and it hereby is ~~granted~~ denied

[*Undated and absent seal*] *S/ Joseph M. McLaughlin*
Circuit Judge
[Computer recorded as
docketed October 11, 1994]

APPENDIX Y - CRAIN'S NEW YORK DECEMBER 5-11, 1994, EXCERPT "O&Y PAY BATTLE SLOWS DEAL"

CRAIN'S NEW YORK BUSINESS
DECEMBER 5-11, 1994

O&Y pay battle slows deal
Execs salaries, bonuses rapped

BY PETER GRANT
CRAIN'S NEW YORK BUSINESS

Thomas P. Falus Senior VP Leasing	$900,000	$337,500
Meyer S. Frucher Executive VP/ Development	$500,000	$187,500
Joel M. Simon Chief Operating Officer	$500,000	$187,500

Just as the battle over control of Olympia & York's U.S. subsidiary moves into its final stage, a fight has erupted over compensation paid to John E. Zuccotti and other senior executives.

Also, another group of creditors is forming to challenge an alliance of Leon Black, Willliam Mack and Citibank that has been positioning itself to take over one of the city's largest office building owners....

The emergence of this group and the fight over compensation signal a crucial turning point for the U.S. subsidiary. O&Y sources predict that within 60 days, either creditors will agree on a plan for restructuring the company or will push it into bankruptcy.

Creditors and management have been working toward this point since 1992, when the parent company filed the Canadian equivalent of bankruptcy. During that time the New York-based subsidiary has spun off its most troubled properties, leaving O&Y with its eight most valuable assets: World Financial Center, 237 and 245 Park Ave., 1290 Sixth Ave., One Liberty Plaza, and buildings in Chicago, Boston and Los Angeles.

Dividing equity

Late last month, the board approved management's formula for dividing the equity in the slimmed-down company among unsecured creditors, which hold more than $750 million in debt, and the creditors of the Canadian parent. Those creditors are owed $4 billion and, in effect, control the equity of the U.S. subsidiary....

APPENDIX Z - FRCP RULE 42(b)

FRCP Rule 42(b) provides:

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

APPENDIX AA - FRCP RULE 49(a)

In pertinent part, FRCP Rule 49 states:

Rule 49. Special Verdicts and Interrogatories
(a) Special Verdicts. The court may require a jury to return only a special verdict... [t]he court may submit to the jury written questions susceptible of categorical or other brief answer.... The court shall give to the jury... instruction.... If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

APPENDIX BB - 28 U.S.C. §46

In pertinent part, 28 U.S.C. §46 provides:

§ 46. Assignment of judges; panels; hearings; quorum

* * *

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless ....

* * *

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges ..., unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service....

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

APPENDIX CC - FRAP EN BANC STATUTE FRAP RULE 35(b)

Rule 35. Determination of Causes by the Court in Banc

* * *

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

APPENDIX DD - SECOND CIRCUIT IN BANC RULE: LOCAL RULE 35 - DETERMINATION OF MAJORITY FOR ORDERING IN BANC CONSIDERATION; COPY OF OPINIONS OR SUMMARY ORDER REQUIRED.

LOCAL RULE 35. DETERMINATION OF MAJORITY FOR ORDERING IN BANC CONSIDERATION; COPY OF OPINIONS OR SUMMARY ORDER REQUIRED

Neither vacancies nor disqualified judges shall be counted in determining the base on which "a majority of the circuit judges of the circuit who are in regular active service" shall be calculated, pursuant to 28 U.S.C. § 46(c), for purposes of ordering a hearing or rehearing in banc.

Each suggestion for rehearing in banc shall include a copy of the opinion or summary order to which the suggestion relates, unless the opinion or summary order is included in a petition for rehearing with the suggestion for rehearing in banc. [Effective May 1, 1991; amended effective July 1, 1992.]

APPENDIX EE - SECOND CIRCUIT QUORUM RULE: LOCAL RULES RELATING TO THE ORGANIZATION OF THE COURT: § 0.14 QUORUM

§ 0.14 Quorum

* * *

(b) Unless directed otherwise, a panel of the court shall consist of three judges. If a judge of a panel of the court which has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of such matter by reason of death, illness, resignation, or incapacity, or shall be relieved of such consideration at the judge's request, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge....

APPENDIX FF - MURRAY CASE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petition for Rehearing
Submitted: July 14, 1994

HWESU S. MURRAY,
Plaintiff-Appellant,

v.

NATIONAL BROADCASTING COMPANY, INC. and BRANDON TARTIKOFF,
Defendants-Appellees.

No. 1566 -- August Term 1993

Docket No. 93-9335

Decided: August 12, 1994

Before: NEWMAN, *Chief Judge*, and
LUMBARD, *Circuit Judge*.[29]

Petition for rehearing of order of summary affirmance in *Murray v. NBC*, No. 93-9335 (2d Cir. June 16, 1994). Plaintiff-appellant challenges disposition of appeal by panel of two judges where third judge recused himself immediately prior to oral argument.

Petition denied.

JON O. NEWMAN, *Chief Judge*:

Appellant's petition for rehearing raises an institutional issue of court procedure that merits a brief opinion. The issue is whether a case may be validly adjudicated by a panel of two circuit judges under circumstances where one of the three judges

---

[29]Judge Oakes, who was originally a member of the panel, recused himself prior to oral argument.

originally assigned to hear the appeal recused himself immediately before oral argument. We conclude that the two-judge panel was authorized to proceed with the determination of the appeal. We therefore deny the petition for rehearing.

The appeal was originally assigned to a panel consisting of Judge Lumbard, Judge Oakes, and the writer. When the case was called for oral argument, Judge Oakes announced that he was recusing himself and left the bench. He has not participated in the adjudication of the appeal. Argument was held before the remaining two judges of the panel. The two-judge panel affirmed by summary order, invoking Rule §0.14(b) of the Local Rules of the Second Circuit. *Murray v. NBC*, No. 93-9335 (2d Cir. June 16, 1994). Appellant's petition for rehearing includes the contention that disposition of the appeal by a two-judge panel violates both 28 U.S.C. §46(b) (1988) and Local Rule §0.14(b).

1. *The statutory claim.* 28 U.S.C. § 46(b) provides:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges....

Though Congress enacted this provision to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels, *see* S. Rep. No 97-275, 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S.C.C.A.N. 11, 19, the legislative history makes clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate:

> The circuit courts could continue to adopt local rules permitting the disposition of an appeal in situations in which one of the three judges dies or becomes disabled and the remaining two agree on the disposition; but, *in the first instance*, all cases would be assigned to [a] panel of at least three judges.

Id. (emphasis added). The fact that the Senate Report identifies death or disability does not preclude unavailability because of late-discovered disqualification. Moreover, the Report makes no

distinction between unavailability occurring before and after oral argument, emphasizing only that the appeal must be assigned "in the first instance" to a panel of three judges. This understanding of subsection 46(b) is explicitly borne out by subsection 46(d), which provides that "[a] majority of the number of judges authorized to constitute a court *or panel thereof*, as provided in paragraph (c) [authorizing panels of not more than three judges], shall constitute a quorum." 28 U.S.C. § 46(d) (1988) (emphasis added).

Since the pending appeal was assigned to a panel of three judges "in the first instance," one of whom thereafter recused himself, we conclude that disposition by the remaining two judges did not violate section 46(c).

2. *The local rule claim.* Appellant's contention is more plausibly supported by reliance on Local Rule § 0.14(b), which provides:

> Unless directed otherwise, a panel of the court shall consist of three judges. If a judge of a panel of the court *which has heard argument or taken under submission any appeal*, petition or motion shall be unable to continue with the consideration of such matter by reason of death, illness, resignation, or incapacity, or shall be relieved of such consideration at the judge's request, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge. If they are not in agreement or either requests such a designation, the Chief Judge will designate another circuit judge to sit in place of the judge who has become unable to continue or has been relieved.

2d Cir. R. § 0.14 (b) (emphasis added). Relying on the underscored words, appellant contends that since Judge Oakes recused himself prior to oral argument, Rule § 0.14(b) does not permit disposition by a two-judge panel.

Though we acknowledge the force of the argument based on the literal wording of the local rule, we conclude, as the Supreme Court said in a somewhat similar context, that this is a situation where "any sacrifice of literalness for common sense does no violence" to the purpose of the rule. *See Textile Mills*

Securities Corp v. Commissioner of Internal Revenue, 314 U.S. 326, 334 (1941). The rule is obviously intended to permit the Court to conduct its business expeditiously despite the unanticipated unavailability of one member of a three-judge panel. The literal terms of the rule would be satisfied had Judge Oakes sat through he oral argument and recused himself immediately thereafter. It makes no sense to apply the rule so mechanically as to require a different result where recusal occurs one-half hour earlier. Indeed, a rigid application of the local rule would arguably place it in tension with the statutory authority of two judges to constitute a quorum. *See* 2 U.S.C. § 46(d); *see also* 2d Cir. R. § 0.14(a) (specifying quorum of two judges).

We recognize that in the normal course of adjudicating appeals, consideration by three judges is preferable. *See Ojeda Rios v. Wigen*, 863 F.2d 196, 199 (2d Cir. 1988) (Newman, J., chambers opinion) (noting that "on matters of substance, where recourse is had to a court of appeals, it is normally preferable, absent an emergency, to have decision rendered by more than an individual judge"); *United States v. Glover*, 731 F.2d 41, 51 (D.C. Cir. 1984) (Mikva, J., dissenting) (criticizing summary procedure permitting physical presence of only two of three judges on motions panel and expressing the view that "the more minds considering a matter, the better the ultimate resolution of the case is likely to be").

Yet, as Judge Mikva recognized in his *Glover* dissent, "as our dockets have become more full, a need for the efficient use of judicial resources has arisen, and ... this quest for efficiency on occasion must be balanced against the need for judicial pluralism." *Id.* When a judge becomes aware of a ground of disqualification just prior to oral argument, replacement of the recused judge would impair the court's efficiency and burden the parties with a return visit to the court. The argument would have to be postponed until a later date when a third judge was available and could become prepared to hear the appeal. That postponement will normally "move[] the case to a new panel, thereby wasting the time invested by the members of the original panel and burdening three additional judges with an appeal that could have been adjudicated by the original panel. " *United States v. Delia*, 925 F.2d 574, 575 (2d Cir. 1991) (Newman, J., chambers opinion).

These considerations impel us to apply Rule § 0.14(b) with

sufficient flexibility to permit disposition by two members of a three-judge panel, at least in those situations where the third judge becomes unavailable within such close proximity to the start of oral argument that replacement in time for maintaining the date of the scheduled argument is not practical. Where a replacement judge can be secured without burdening the court or the parties, it will normally be preferable to do so. Under the circumstances of this case, we conclude that the local rule does not preclude disposition of the appeal by the remaining two members of the panel.

Though not requested to do so by the appellant, we have considered whether a third judge should now be enlisted for the limited purpose of considering this petition for rehearing. The efficiency concerns that weigh against requiring a third judge to hear the appeal itself are somewhat reduced at the rehearing state, yet the need for a full panel of three judges is also somewhat reduced by virtue of the narrow focus of a rehearing petition, submitted after plenary consideration of an appeal. On such petitions, oral argument is not permitted and no response is received unless requested by the court. See Fed. R. App. P. 40 (a). On Balance, we conclude that the remaining two members of the panel, explicitly authorized to constitute a quorum eligible to act, see 28 U.S.C. § 46(d), should adjudicate the petition without a third judge.

We have considered the substantive issues presented by the petition and conclude that the petition should be denied.[30]

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[30]Because this opinion concerns, in part, an administrative matter, the opinion has been circulated to all of the active judges of this Court prior to filing. *See United States v. Burnett*, 989 F.2d 100, 102 n.1 (2d Cir. 1993).

94-1364

No. 94-1365

Supreme Court, U.S.
FILED
MAR 15 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FEI, LTD., JOHN J. FOGARTY and JEAN FOGARTY,

Petitioners,

—against—

OLYMPIA & YORK BATTERY PARK COMPANY, also known as WFC TOWER A COMPANY; O&Y (U.S.) DEVELOPMENT CORP., as successor to O&Y TOWER C CORP.; OLYMPIA & YORK TOWER B COMPANY; OLYMPIA & YORK TOWER D COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was it proper for the Court of Appeals for the Second Circuit, consistent with Second Circuit Local Rule § 0.14(b), which expressly permits a judge's recusal subsequent to oral argument and decision by a two-judge panel, to decide petitioner's appeal with a two-judge panel, when one of the judges recused himself after oral argument?

II. Did the Court of Appeals for the Second Circuit correctly affirm the decision of the district court to dismiss certain cross-claims by the petitioner because they were incorporated in the jury's verdict when evidence on such claims was presented to the jury, and the jury's verdict necessarily included a substantial award to the petitioner on such claims?

III. Was the dismissal of petitioner's cross-claims consistent with Federal Rule of Civil Procedure 49(a) when those claims were incorporated in the jury's verdict, and petitioner did not object to the special interrogatories submitted to the jury?

RULE 29.1 LISTING

Respondent Olympia & York Battery Park Company, also known as WFC Tower A Company; O&Y (U.S.) Development Corp., as successor to O&Y Tower C Corp; Olympia & York Tower B Company and Olympia & York Tower D Company state that they have the following affiliates that are not wholly owned:

Abitibi-Price, Inc.

Gulf Canada Resources, Ltd.

Landmark Land Company, Inc.

Santa Fe Pacific Corporation

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STATEMENT OF THE CASE

In this construction dispute, FEI, Ltd. and its principals ("FEI" or "petitioner") request certiorari to have the Court consider whether it is owed yet additional compensation by Olympia & York ("O&Y").[1] FEI seeks to use this petition to secure remuneration beyond the $22 million O&Y already paid FEI and its suppliers to design, fabricate and erect the granite cladding on two large office towers at the World Financial Center in lower Manhattan. Petitioner asserts inconsistently that its cross-claims against O&Y, on which it submitted evidence at trial and ultimately received a verdict representing more than $7.8 million in recovery, were severed prior to trial and improperly dismissed from the case after verdict.

These arguments, however, do not raise any "special or important" reasons that would merit this Court's review under Supreme Court Rule 10.1. There was no failure to follow accepted judicial procedure that would justify the exercise of this Court's powers of supervision. In fact, as found by the trial court judge and by the Court of Appeals for the Second Circuit, FEI presented evidence on its cross-claims, that evidence was considered by the jury in its determination of what O&Y agreed to pay FEI, and FEI ultimately prevailed on its claims in the amount of approximately $7.8 million. The jury also determined that FEI had defaulted on its obligations to O&Y, but that, despite O&Y's payment of over $22 million to FEI on a contract whose original price was $14.1 million, O&Y's damages because of FEI's default amounted to only $600,000. Thus, as found by the district court and affirmed by the Second Circuit, because O&Y paid far more than the original contract contemplated, FEI has already recovered approximately $7.8 million on the claims it seeks to reassert via its appeals, and FEI's adjudged contract default bars any further recovery.

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[1] The plaintiffs-appellees Olympia & York Battery Park Company, O&Y (U.S.) Development Corp., Olympia & York Tower B Company and Olympia & York Tower D Company are all affiliated, and for the sake of simplicity, are referred to herein collectively as "O&Y."

A. FEI's Default

As summarized by the district court judge in ruling on the post-trial motions, FEI defaulted in November, 1984, when, in mid-contract, it became financially unable to perform its obligations. (A 33, 51).[2]

The original contract price for FEI's work was $14.1 million. (A 38). Following FEI's default, O&Y spent an additional $13 million to complete the work, $7.8 million of which O&Y paid directly to FEI and its suppliers. (A 36-40). Finally, O&Y terminated FEI in 1986 because of its continuing financial default and employed other contractors to complete the remaining work. (A 38, 41).

B. Commencement Of This Action And Trial

In February 1985, O&Y commenced this action against FEI's bonding company, Insurance Company of North America ("INA"). INA impleaded FEI to recover on its indemnity to INA. INA and FEI each alleged that O&Y had caused FEI's default. In addition, FEI brought cross-claims against O&Y asserting that, following its default in November 1984, in order to induce FEI to stay on the job, O&Y agreed to cover all of FEI's expenses to complete the work, including payroll and overhead, and that such payments over and above the $14.1 million contract price would not have to be reimbursed. (A 38-44).

This case was tried to a jury for six weeks in February and March 1988. Although, at one point, the judge nominally severed certain FEI cross-claims, evidence of those same claims was permitted at trial on a slightly different theory, that is, as part of FEI's proof of what O&Y agreed to pay FEI. (A 5, 28). In answers to special interrogatories, the jury found (1) that FEI had defaulted and (2) that O&Y had not caused the default. (A 33-34). Despite the overpayment of $7.8 million, the jury awarded O&Y damages of only $600,000. (A 34).

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[2] The prefix "A" followed by a number refers to pages in the Appendix submitted by petitioner.

C. Post-Trial Rulings

It was undisputed at trial that, between FEI's default in 1984 and FEI's termination in 1986, O&Y had advanced $7.8 million to FEI and its suppliers beyond the $14.1 million contract price. (A 40-41). Accordingly, based on the jury's finding of a default by FEI, O&Y moved for judgment n.o.v. to set aside the $600,000 damage verdict and replace it with a damage award of at least $7.8 million. (A 35-36).

The district court denied O&Y's motion. (A 34-45). In a September 19, 1988 opinion, the district court harmonized the jury verdict by concluding that the jury must have found "that the adjusted contract price was not $14.1 million, but $14.1 million plus about $7.8 million, or $22 million" (A 40), and that the $600,000 damage figure was the reasonable cost of completing the work following FEI's termination in April 1986. (A 41-42). The district court found sufficient evidence to support its reading of the verdict in testimony from FEI's president, Mr. Fogarty. Fogarty testified that in November 1984, when FEI first became financially unable to perform, O&Y asked his company to stay on the job and promised that if it did, "You won't be hurt." (A 38). Fogarty also testified that, in order to induce FEI to stay on the job, O&Y agreed to make substantial payments to FEI, and also to its suppliers, over and above the then existing $14.1 million contract price. (*Id.*). In addition, the court received into evidence a summary indicating that by October 1985 O&Y had agreed to pay FEI $21,115,894, of which $19,037,515 had already been paid, and documenting FEI's cross-claims. (A 28).[3]

On June 2, 1989, the district court granted INA's motion for judgment notwithstanding the verdict on the ground that the increase in the contract price from $14.1 million to $22 mil-

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[3] This same evidence of the additional payments O&Y purportedly agreed to make was Exhibit 1 to FEI's Third Party Complaint, and served as the basis of FEI's cross-claims, the very claims FEI seeks to reassert through its appeal and this petition.

lion was a material alteration that discharged INA on its bonds as a matter of law.[4] (A 54-55).

D. The Additional Claims Asserted By FEI

Following these two post-trial rulings, FEI asked for a second trial on its third-party claims against O&Y which it asserted had not been included in the first trial. (A 2). FEI's third-party claims fell into two categories: first, amounts allegedly due for work on the two buildings which were the focus of the jury trial (Buildings A and C); and, second, amounts allegedly due for work taken away from FEI on two other buildings at the same site, known as Buildings B and D. In April 1985, O&Y had notified FEI that, because of its financial default on the work it was doing on Buildings A and C, FEI's contracts on Buildings B and D were being terminated. (*Id.*)

After trial, on November 4, 1988, FEI submitted an "affirmation" of its counsel to the district court in which it asserted three claims in connection with Buildings A and C: (1) a claim for overhead of $900,000; (2) a claim for taxes of $1,000,000; and (3) a claim for retention monies of $735,213 (collectively, the "November 1988 claims"). (A 2, 11-12). FEI asserted without substantiation that these were amounts that O&Y had agreed to pay, but which had not been paid. FEI's submission did not show whether the amounts claimed on Buildings A and C were part of or went beyond the $7.8 million that O&Y had already paid. (*See* A 3-4).[5]

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[4] Final judgment pursuant to Fed. R. Civ. P. 54(b) was entered in favor of INA dismissing all of O&Y's claims on October 1, 1991. No appeal was taken.

[5] Indeed, FEI's counsel initially admitted that FEI's third-party claims *were* included within the additional $7.8 million O&Y had already paid, stating:

> "FEI does not concede the court's view of an additional 7.8 million on top of 14 million, to give 22. That analysis of adjusted contract price expansion I don't concede. And my view has been consistent that the $14 million adjusted contract price is what that jury looked at. *And our claims can be taken from that perspective.*"

The affirmation of FEI's counsel also included claims with respect to Buildings B and D. They consisted of a claim for retention of $323,937 and a claim for unpaid work of $400,000 (the "B and D claims"). (A 2, 11-12). With respect to FEI's claims on Buildings B and D, O&Y took the position that, because the jury had found that FEI had in fact defaulted on Buildings A and C, O&Y had been justified in terminating FEI's contract on Buildings B and D. (A 14). The district court confirmed the correctness of O&Y's position, stating that O&Y had a right after the fall of 1984 to terminate FEI for financial inability. (A 15).

After the submission of these claims, O&Y moved to dismiss FEI's November 1988 claims on the ground that they had been incorporated into the jury verdict, and several years passed during which time the district court encouraged the parties to settle their differences.

E. The Dismissal Of FEI's Additional Claims

1. The Dismissal Of The November 1988 Claims

At a December 23, 1992 post-trial conference, the district court dismissed FEI's November 1988 claims on two alternative grounds: (a) either they were included within $7.8 million above the original contract price that O&Y had already paid FEI, in which case there was "no possible basis for some additional claim" (A 3-4); or, (b), if they were not included within the $7.8 million, they would nevertheless be deemed to have been precluded by the jury verdict because the issue of what O&Y agreed to pay FEI for its work on Buildings A and C was fully presented to the jury in March 1988 and claims for overhead, taxes and retention were never with-

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(Pretrial Conference, October 4, 1988; emphasis added). FEI's counsel also stated that:

> "[FEI's] direct claim [against O&Y], to my understanding, your Honor, *is identical to the claim that was litigated [by O&Y] against INA, it is not a different case*."

(Pretrial Conference, September 14, 1988; emphasis added).

drawn from the jury's consideration. (A 4). Thus, the district court stated:

> "I am prepared to rule—and this is the only way that is compatible with any sense of an orderly trial of that case—that *the parties had an opportunity to present all the evidence that they wished to present about every element that O&Y agreed to pay on buildings A and C. Nobody reserved the question of whether O&Y agreed to pay overhead, or reserved the question*, which I will come to later, *about whether O&Y agreed to pay some taxes*. Nobody reserved that as being some special contractual agreement which was not to be included with what was presented to the jury. And I must say, if there had been a suggestion of that, it would have been something that would have been quite anomalous. We were having a hard-fought jury trial on these basic issues, and there would have been no sense in reserving some special part of the agreed price for some later determination for some unknown purpose. There would have been no purpose in it, and it would have been foolish. So, in my view, *the parties tried the issue of what was the total agreement of O&Y as to what it would pay FEI on A and C*.
>
> The problem from O&Y's standpoint is that O&Y insisted that the amount of that agreement was what was in the 14.9 million contract price, and O&Y steadfastly insisted that that was all it agreed to. But the jury found that the amount was higher. Regardless of the precise components of what was argued about and what wasn't argued about, the issue was presented to the jury. Therefore, if FEI did not specially mention the $900,000 as being part of that agreement, if they wanted to have that included they should have argued about it. They should have said that the adjusted contract price was 22 million plus 900,000. That was the time to do it. It is not the time to do it after the trial."

(A 5; emphasis added).

* * *

> "*Everything I have said about overhead applies [to the tax reimbursement claim* of a million dollars.] If there was to be some claim that O&Y agreed to reimburse taxes in the amount of a million dollars, and that was part of the ultimate agreed price paid by O&Y, the time to do it was at the trial. It seems to me that they had all the evidence and they had all the arguments—when I say 'they,' the jury—that anybody wanted to make, and the issue was before the jury: What did O&Y agree to pay? If somebody wanted to say, well, it wasn't just 22 million, it was 22 plus 900,000 or 22 plus $1,900,000, that is the time to argue it, not in some separate proceedings later."

(A 6; emphasis added).

* * *

> "Now I want to go on to *the retentions*. I discussed that in my opinion at September 19, 1988, at pages 14 and 15 . . . I said, and I am referring to buildings A and C obviously, '*Even if O&Y retained the 1.6 million at some point, O&Y has more than made up this deficiency by the [extra] $7.8 million payments it made to and on behalf of FEI* beginning in the fall of 1984'—which have been described previously. So I believe that that ruling of mine is sound, I stick by it. That covers the claim for retention in the amount of $735,213 for A and C."

(A 9; emphasis added).

The district court in its December 23, 1992 ruling initially declined to dismiss the claims on buildings B and D, finding that, in contrast to the November 1988 claims, they were not, in fact, covered by the jury verdict. (A 10). Rather than schedule a trial, the district court suggested that the parties try to settle their remaining differences, stating:

> "The total amount, not covered by the verdict, is $723,937. The verdict against FEI is $600,000. The

> unpaid loan owed by FEI to O&Y is $456,251. The total of those amounts of $1,056,251. We have mutual accounts. We have an amount owing from FEI to O&Y of $1,056,251. We have claims by FEI against O&Y, which I have held are not covered by the verdict, of $723,937.
>
> If we should assume that FEI wins every penny of the $723,937, this would still leave a balance in O&Y's favor of $332,314."

(A 12).

2. The Conditional Dismissal Of Claims On Buildings B And D

In February 1993, O&Y learned that FEI had become insolvent, and understood that it was therefore unlikely ever to recover any portion of the $1,056,251 it was entitled to recover on the verdict and the unpaid loan to FEI. Accordingly, at a conference before the district court on April 3, 1993, O&Y offered to forego enforcement of its $1,056,251 claim if FEI dropped its offsetting claims of $723,937 on Buildings B and D. O&Y's offer was conditioned on FEI's agreement to settle all claims, including the November 1988 claims.

In light of O&Y's willingness to forego enforcement of its claims, the district court fashioned a Rule 54(b) Order and Judgment of Conditional Dismissal, which was entered in May, 1993, dismissing the parties' claims against each other on the jury verdict and subjecting the B and D claims to a conditional dismissal, to be reopened if the judgment on the other claims were reversed. (A 24-25, 103, 113-14, 117-18). The court stated that it would be a "gross waste of everybody's effort to continue litigation," explaining:

> "As far as the district court proceeding is concerned, it should be over with now, regardless of whether FEI consents or not. *There is no utility in having a trial or a legal argument or anything further in the district court,*

because the only effect of further district court proceedings would be some judgment in favor of O&Y, and O&Y is willing to concede that, as far as the district court is concerned, it will not seek to recover that judgment.

* * *

But O&Y has this claim, FEI has their claims, the only possible effect would be to have a judgment in favor of O&Y of somewhere between $300,000 and a million dollars, and reflect the fact that the Court is ordering what you [i.e., O&Y] have agreed to, and the Court is ordering dismissal of that claim and, necessarily, a dismissal of FEI's setoffs, whatever they are."

(A 114; emphasis added).

F. Entry Of Judgment And Appeal

Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure was entered dated May 4, 1993 with respect to the November 1988 claims. (A 24-25). In addition, the district court entered an Order of Conditional Dismissal of (a) O&Y's million-dollar claim based on the verdict and an unpaid loan and (b) FEI's offsetting B and D claims. (*Id.*) FEI's cross-motion for a trial of its claims on all of the buildings was summarily denied on May 3, 1993. (A 61-62).

FEI appealed. After full briefing and argument (A 87-112), the Second Circuit affirmed the findings of the trial court made in the conference direction of December 23, 1992. (A 21-22). The appellate panel consisted of Judges Winter and McLaughlin (the late Judge Timbers had heard argument as well, but had subsequently recused himself). The Court of Appeals also denied FEI's petition for rehearing en banc. (A 23). This petition for certiorari followed.

SUMMARY OF ARGUMENT

The present petition presents no issue of sufficient significance or deviation from accepted practice that would merit granting certiorari. The petition instead revolves around garden-variety issues of contract performance, issues which were fully considered and properly decided below.

Petitioner relies on what are, in substance, three arguments. First, FEI claims that circumstances surrounding the issuance of a decision by the Second Circuit by two judges, rather than three, following the recusal of Judge Timbers shortly before his death, were so fundamentally unfair and contrary to the accepted Rules of the Second Circuit and appellate procedure as to merit review. (Pet. at 16-18).[6] However, the Second Circuit's rules were followed, petitioner can articulate no prejudice caused by the recusal, and no cited authority supports petitioner's position.

Second, petitioner contends that it was unfairly precluded from a second, separate trial on the November 1988 claims, regarding items of overhead, taxes and retention, items it styled as part of its cross-claims. (Pet. at 18-21). This assertion, however, lacks substance because petitioner nonetheless presented evidence on these and related issues, and received a jury verdict that awarded FEI substantial recovery that included the November 1988 claims.

Third, along the same lines, petitioner takes the position that the dismissal of these November 1988 claims because they were included in the jury's verdict, as indicated by the jury's response to the special interrogatories, was without authority under Rule 49(a) of the Federal Rules of Civil Procedure. (Pet. at 21-22). Petitioner failed, however, as required by Rule 49(a), to make timely objection to the special interrogatories given to the jury, and, again, petitioner presented evidence and received very substantial recovery on its claims,

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[6] References to Petitioner's Brief are indicated by "Pet." followed by the relevant page number.

rendering the judge's dismissal of the November 1988 claims after the verdict entirely proper and fair.

ARGUMENT

I. The Second Circuit's Consideration of the Appeal With a Two-Judge Panel Following the Recusal of the Late Judge Timbers Was Consistent With the Accepted and Usual Course of Judicial Proceedings

Petitioner attempts to advance the position that the timing of the entry of the Second Circuit's order affirming the trial court, along with recusal of the late Judge Timbers shortly before his death, was precluded by the Second Circuit's own rules. Petitioner, however, is incorrect.

To begin with, there was no violation of Second Circuit procedure under Second Circuit Local Rule § 0.14(b) with respect to Judge Timbers' recusal and the subsequent decision of the case by the remaining members of the panel. The local rule provides that if a three-judge panel has heard argument

> and petition or motion shall be unable to continue with the consideration of such matters by reason of death, illness, resignation or incapacity, or shall be relieved of such consideration at the judge's request, *the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge*.

(A 145; emphasis added). That is exactly what happened here.

Indeed, the case cited by petitioner, *Murray v. National Broadcasting Co. Inc.*, 35 F.3d 45 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 734 (1995), stands for the opposite of the proposition which petitioner seeks to establish. As explained by the Second Circuit in that case, "the legislative history [of 28 U.S.C. § 46(b)] makes clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member becomes unable to participate." 35 F.2d at

47 (A 144). Moreover, the *Murray* decision makes clear that Second Circuit Local Rule § 0.14(b) does not bar recusal after oral argument:

> "The [local] rule is obviously intended to permit the Court to conduct its business expeditiously despite the unanticipated unavailability of one member of a three-judge panel . . . the literal terms of the rule would be satisfied had Judge Oakes [the missing judge] sat through the oral argument and recused himself . . . thereafter."

Id. (A 146).

In the present case, the local rule was followed. The recusal of Judge Timbers did not require the appointment of a replacement judge, the reargument of the appeal, or a statement of reasons for recusal.[7] In deciding the appeal following Judge Timbers' recusal, the Second Circuit followed reasonable and accepted judicial practice.

II. The Trial Court's Decision That the November 1988 Claims Were Included in the Jury's Verdict Was Proper

Petitioner also apparently contends, (Pet. at 18-21), that the jury did not consider the November 1988 claims because they were severed, and that the findings of the courts below that the jury did consider them constitutes such fundamental error as to warrant the exercise of the Court's supervisory power. There is no basis, however, for this contention, either in the law, in the record or in terms of any claimed effect on the petitioner.

As set out above, and as found by the trial and appellate court, petitioner presented evidence on his cross-claims to the

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[7] Petitioner also claims that the recusal of Judge Timbers impermissibly burdened its right to petition for rehearing en banc. (Pet. at 17). However, petitioner has not supported its contention, either by demonstrating prejudice to it, or by citing legal authority for this assertion.

jury, and, indeed, recovered on those claims. That is, the jury found that FEI defaulted, and that, despite the fact that O&Y had paid over $22 million to FEI—$7.8 million more than the original contact price—FEI owed O&Y only $600,000 with respect to FEI's default. Moreover, the record reflects that evidence relating to petitioner's November 1988 claims against O&Y was presented to the jury as part of the determination of what O&Y agreed to pay. Accordingly, the November 1988 claims were properly found to have been included in the verdict. (*See* A 28 (exhibit re: FEI claims given to jury); A 3-7, (holding that no reservation of issue of November 1988 claims occurred and jury was able to consider all the evidence relating to what O&Y agreed to pay)).[8] In addition, because the jury had already determined that FEI had defaulted, but that O&Y had damages of only $600,000, despite the fact O&Y paid $7.8 million over the original contract price, FEI's default must bar any further recovery.

In short, although petitioner would like—in some incoherent fashion—to rehash the evidence and argue another version of the jury's finding, there is no support in the record for such arguments because, although FEI's third-party claims were nominally severed, FEI presented its claims and its evidence as to what it was owed by O&Y at trial, and prevailed there to escape many millions of dollars worth of O&Y claims.[9]

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[8] Petitioner's contention that the jury found that O&Y waived its claim to the additional $7.8 million above the original contract price (Pet. at 21) is absurd. If, as contended by petitioner, the jury found that FEI had *no* obligations, or that O&Y "waived" its claim, there is no way FEI could have been found to have defaulted on its obligations to O&Y. In fact, the trial judge expressly rejected this argument. (A 43) (noting and adhering to ruling that under no view of the evidence could it be found that O&Y failed to fulfill a condition precedent which relieved FEI of all responsibility).

[9] Petitioner also takes the position that the decision ought to be reversed because there was no default by FEI and because FEI's B and D claims should be permitted to go to trial (Pet. at 22-23). Such arguments entirely ignore the substance of the jury's verdict: that FEI defaulted, and was responsible for $600,000 of O&Y damages because of its financial default.

III. The Court's Decision to Dismiss the Cross-Claims After Trial Comported With Federal Rule 49(a)

Finally, plaintiff takes the position that the dismissal of the cross-claims was not justified under Rule 49(a) of the Federal Rules of Civil Procedure. This argument, again, is without merit, and does not provide any basis for the grant of the writ here.

Rule 49(a), which governs special verdicts and interrogatories, states, in pertinent part:

> "The court shall give to the jury such explanation and instruction concerning the matter thus submitted [by special verdict] as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, *each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding*; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

(Emphasis added).

Thus, Rule 49(a) permits the district court to make its own findings with respect to issues of fact raised by the pleadings or by the evidence that could have been included in the explanation and instructions concerning the matter submitted by special verdict form, but which were omitted. The only exception to the court's discretion arises when, before the jury retires, a party demands that an issue not covered by the verdict form be submitted to the jury. *See, e.g., Cote v. Estate of Butler*, 518 F.2d 157, 160 (2d Cir. 1975).[10]

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[10] In *Cote*, the special interrogatories did not specifically address certain cross-claims and no one objected to the omission. The district court subsequently entered judgment dismissing the cross-claims. In affirming the district court's ruling, the Court of Appeals for the Second Circuit stated:

Here, FEI essentially claims that the special interrogatories omitted issues pertaining to certain of its claims for money which O&Y allegedly agreed to pay, *i.e.*, $900,000 for overhead, $1,000,000 for taxes, and $753,213 for retention. The issue of what O&Y agreed to pay FEI—*i.e.*, the "adjusted contract price"—was covered by Special Interrogatory Number 3 which asked:

> "What is the amount of expenses *above the adjusted contract price*, if any, that you find by a preponderance of the evidence O&Y reasonably incurred to complete or repair FEI's work under the contract?"

(A 34; emphasis added). In order to answer this question, the jury had to determine what the "adjusted contract price" was. The "adjusted contract price" was the total amount that O&Y had agreed to pay FEI. If FEI felt that the district court's instructions to the jury did not sufficiently address FEI's claims for overhead, taxes and retention, FEI was required to make a demand before the jury retired so that these matters could be submitted to the jury or waived. No demand was made and no exception taken—despite that fact that FEI had already presented evidence to the jury on its claims. Accordingly, FEI waived its right to a jury trial on these claims. Pursuant to Rule 49(a), the district court was then permitted to make its own findings, which it proceeded to do by dismissing the November 1988 claims on the ground that they were included in the verdict.[11]

> "As to the claimed erroneous omission from the special verdict of questions relating to the cross-claims, . . . *any objections [cross-claimants] may have been entitled to make were waived by its subsequent failure to bring exceptions to the omission to the attention of the trial judge*."

518 F.2d at 160 (emphasis added). Accordingly, the Second Circuit affirmed the district court's denial of any right to a jury trial of those claims and its corresponding dismissal of the cross-claims based on the jury's responses to the special interrogatories. *Id.*

[11] The cases cited by FEI are either completely inapposite or support O&Y. For example, *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982), *overruled on other grounds by McKinney v. Pate*, 20

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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F.3d 1550 (11th Cir. 1994), supports affirmance in this case. There as here, counsel "did not object to the [special] interrogatories." *Id.* at 1335. Therefore, the Eleventh Circuit held that the district court was permitted to make a finding on the relevant issue in conformity with the jury's answers to the special interrogatories, as the district court did here. *Id*

Martinez v. Union Pac. R.R. Co., 714 F.2d 1028, 1032 (10th Cir. 1983), and *Cutlass Prod., Inc. v. Bregman*, 682 F.2d 323, 327 (2d Cir. 1982), stand for the unremarkable—and undisputed—proposition that upon deciding to employ particular special interrogatories, the district court must insure that all material issues are clearly submitted to the jury. While true, this proposition is beside the point, because FEI made absolutely no showing that any *material* issue of fact was not covered by the special interrogatories to the jury or that the interrogatories were unclear.

Taherzadeh v. Clements, 781 F.2d 1093 (5th Cir. 1986), is also irrelevant. There, in stark contrast to this case, "[c]ounsel for Taherzadeh timely objected to the omission of his proffered issues concerning default from the charge." *Id.* at 1098. Here, one reason that FEI was not entitled to a second trial is that it failed to object to the omission from the special verdict interrogatories of any further reference to the claims it seeks to assert; and the district court and Court of Appeals found that the jury received the evidence of these claims and resolved the claims overwhelmingly in favor of FEI.